Supreme Court, U.S.
FILED
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APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

~~No.~~ 70-49

STATE OF HAWAII, *Petitioner*,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed December 8, 1970
Certiorari Granted March 1, 1971

APPENDIX

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. 1060

STATE OF HAWAII, *Petitioner*,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed December 5, 1970

Certiorari Granted March 1, 1971

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RELEVANT DOCKET ENTRIES IN THE PROCEEDINGS BELOW

United States Court of Appeals
For the Ninth Circuit

24603

Date	Filings-Proceedings
1969	
July 28	Filed Order (E Ca) Granting Permission to Appeal under §1292(b). (Clerk's Fee: Appellant $25) Docketed cause and entered appearances of counsel.
Sept. 8	Filed Cert Transc of Record on Appeal, in five volumes; Vol I, Pleadings; Vols II-V, Rptr's Transc, orig and 1 copy.
Nov. 4	Filed two add'l copies of Vol K of Record: Clerk's Fee: 84 pp (Clerk's Fee: Appellant $5.00).
Dec. 24	Lodged 4 copies of Applts Document re: motion and brief in the matter of State of Georgia vs. Pennsylvania RR Co as filed in SC.
1970	
Jan. 12	Loaned copy of 5 vol record and applt's brief to Calif Atty Genl office—for 2 days. rtd 1/14/70.
Jan. 26	Received letter of Jan. 23/70 from counsel Kirkham (Pillsbury, Madison & Sutro) re *Philadelphia Housing Authority* now reported at par. 73013 of CCH Trade Regulation Reports.
Jan. 26	Filed 25 Appellees Briefs.

Jan. 26—Filed Orig and 24 Amicus Curiae Brief of the State of Calif.

Filed Motion and Order (C) extending time to file applt reply brief to Feb 23, '70.

Calendared 4/15

Feb. 20—Filed 25 Appellants Reply Briefs—Union Oil Co. in reply to Appellee, and Amicus Brief of the State of California.

—Standard Oil, Shell Oil and Chevron Asphalt

—Standard Oil, Shell Oil and Chevron Asphalt in reply to brief of California as Amicus Curiae.

March 25—Recvd. letter of 3/24 from applts re: add'l argument time (panel).

April 7—Recvd. directive (WBL) advising counsel that court will allow 45 minutes for each side to argue.

April 7—Filed order (M) granting req for add'l time.

April 15—Cause argued and submitted to M. W. T.

Aug. 14—Rcd. add'l authority on behalf of respondents (to M. W. Tr).

Aug. 31—Recvd. letter of 8/27 from appellee counsel re: add'l authority (panel).

Sept. 25—Ordered opinion (Merrill) filed and judgment to be filed and entd.

Sept. 25—Filed opinion. Reversed and remanded.

Sept. 25—Filed and entered Judgment.

Oct. 5—Filed orig and 3 appellee's application for stay of mandate to M:

Oct. 5—Filed application and order. (M) staying judgment to November 5, 1970.

Oct. 7—Issued certified copy of record to Clk, SC, for certiorari (Clerk's Fee: Appellant $9.60).

Oct. 9—Filed orig and three of Cost Bill for applts Std Oil (attached to Judgment).

Oct. 9—Filed orig and 3 of Cost Bill for applts Union Oil Co (attached to Judgment).

Oct. 14—Filed orig and 9 appellee's motion for an additional stay of judgment to W.

Oct. 15—Filed appellee's application (W) ext. staying judgment to December 5, 1970.

Dec. 8—Recvd. notice from Clk, SC, re: filing pet for cert SC#1060.

A true copy
Attest 3/8/71
Wm. B. Luck, Clerk
by /s/ Raymond D Heuret
Deputy

United States District Court
District of Hawaii

Civil No. 2826

Title of Case

STATE OF HAWAII,

Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
UNION OIL COMPANY OF CALIFORNIA,
and SHELL OIL COMPANY,
and CHEVRON ASPHALT COMPANY,

Defendants.

5-24-68
(amended comp.)

Basis of action: Violation of the Clayton Act. Sec. 4&16
Sections 11 & 13 Chapter 205A RLH

Attorneys

For Plaintiff:

Bert T. Kobayashi
Attorney General
State of Hawaii
Joseph L. Alioto
Maxwell M. Blecher
Lawrence Alioto
111 Sutter St. S.F.

For Defendant:

Roy A. Vitousek, Jr.
(Standard Oil & Chevron Asphalt Co.)
William M. Swope
(Shell Oil Co.)
Frank D. Padgett
(Union Oil Co. of Calif.)
Daniel H. Case
(Standard Oil Co. of Calif.)

Date	*Plaintiff's Account*	
1968		
Apr. 11	Atty Gen. Hawaii	Received $15.00
19	Treas. U.S.	Disbursed $15.00

Date	Filings-Proceedings
1968	
Apr. 1	Complaint and Summons filed Summons issued
Apr. 3	Return on Service of Writ filed—served Std Oil Co. of Calif.
	Return on Service of Writ filed—served Union Oil Co. of Calif.
	Return on Service of Writ filed—served Shell Oil Co.
Apr. 4	Pre-Trial Order No. 1 filed *Pence* (Prelim PT set for May 13, 1968 @ 10 a.m.) cc to parties by registered mail
Apr. 8	Motion and Memorandum for Pre-Trial Conference Under Rule 16 filed
Apr. 19	Proposed Pre-trial Order No. 2 and Agenda filed

Apr. 29—Stipulation filed *Pence*

May 7—Addendum to Agenda of Plaintiff's Proposed Pretrial Order No. 2 filed

May 10—Memorandum of Standard Oil Company of California in Response to Plaintiff's Proposed Pretrial Order No. 2 and Agenda filed

May 15—Memorandum of Shell Oil Company in Response to Plaintiff's Pretrial Conference Agenda and Draft Pretrial Order No. 2 filed

May 17—Memorandum For Defendant Union Oil Company of California in Response to Plaintiff's Agenda and Draft Pretrial Order No. 2 filed

May 23—Entering proceedings—appearances by attorneys—oral statements of the Issues Involved—P.T.O. No. 2—Plaintiff's motion to file an Amended Complaint— *Pence*

May 24—Amended Complaint filed

June 7—Pre-Trial Order No. 2 filed ——— *Pence*
(Hearing on Motions and Objections set for 7-30-68 @ 10:00 a.m.)

June 14—Plaintiff's First set of Interrogatories to Defendants Propounded by Plaintiff Pursuant to Rule 33 Federal Rules of Civil Procedure filed

Motion to Produce Under Rule 34 filed

Plaintiff's Second Set of Interrogatories to Defendants filed

June 21—Reporter's Transcript, Thursday, May 23, 1968 filed (Cydney von Savoye, Reporter, U.S. District Court, San Francisco, California)

June 27—Motion of Shell Oil Company for Production of Documents, and Supporting Memorandum and Affidavit filed

Motion of Shell Oil Company to Strike Certain Portions of Amended Complaint, and Memorandum in Support of Motion filed.

Interrogatories of Shell Oil Company filed

June 28—Notice of Motion and Motion of Defendants Standard Oil Company of California and Chevron Asphalt Company for an Order Dismissing Count Two of the Amended Complaint filed—set for 7-30-68 @ 10:00 a.m. before Judge Pence

Memorandum of Defendants Standard Oil Company of California and Chevron Asphalt Company in Support of Motion to Dismiss Count Two of the Complaint filed

Statement of Standard Oil Company of California and Chevron Asphalt Company that said defendants Join in the Motions to Strike filed by Shell Oil Company and Union Oil Company of California filed

Notice of Motion and Motion of Defendants Standard Oil Company of California and Chevron Asphalt Company for Production of Documents Under Rule 34 filed

June 28—First Set of Interrogatories Propounded by Defendants Standard Oil Company of California and Chevron Asphalt Company filed

June 28—Certificate of Service filed

July 1—Motion of Defendant Union Oil Company of California to Dismiss Count Two of the Amended Complaint; to Strike; and for Separate Statement filed

Defendant Union Oil Company of California's First Motion for Production of Documents filed

Certificate of Service filed

First Interrogatories Propounded to Plaintiff by Defendant Union Oil Company of California filed

First Request for Admission Propounded to Plaintiff by Defendant Union Oil Company of California filed

Memorandum for Defendant Union Oil Company of California in Support of Motions to Dismiss Count Two of the Amended Complaint; to Strike; and for Separate Statement filed

July 18—Motion to Strike and Objections of Shell Oil Company to Plaintiff's Rule 34 Motion to Produce and First and Second Set of Interrogatories and Supporting Memorandum filed

July 19—Plaintiff's Memorandum in Opposition to Motion of Defendants Standard Oil Company and Chevron Asphalt Company to Dismiss Count II of the Complaint filed

Memorandum in Opposition to Motion of Defendant Union Oil Company for Separate Statement filed

Memorandum of Points and Authorities in Response to the Motion to Produce of the Standard Oil Company of California, Chevron Asphalt Company, Union Oil Company of California and Shell Oil Company filed

Plaintiff's Opposition to Defendants' Motion to Dismiss or Strike Portions of the Amended Complaint filed

Objections of Defendant, Union Oil Company of California to Plaintiff's Interrogatories filed

Affidavits of R. A. Goddard, M. E. Joyce, E. A. McFadden, C. E. Rathbone and M. S. Thompson in Support of Objections of Defendant Union Oil Company to Plaintiff's Second Set of Interrogatories and Motion to Produce Under Rule 34 filed

Affidavit of G. H. O'Leary in Support of Objections of Defendant Union Oil Company of California to Plaintiff's First Set of Interrogatories filed

Certificate of Service filed

Objections of Defendant Union Oil Company of California to Plaintiff's Motion to Produce Under Rule 34 filed

Memorandum for Defendant Union Oil Company of California in Support of Objections to Plaintiff's Interrogatories and Motion to Produce Under Rule 34 filed

Objection to Defendant Union Oil Company's Request for Admission of Facts and Motion to Strike filed

July 22—Objections of Defendants Standard Oil Company of California and Chevron Asphalt Company to Plaintiff's Motion to Produce and First and Second Sets of Interrogatories and Motion of Said Defendants Seeking Protective Order filed

Memorandum of Standard Oil Company of California and Chevron Asphalt Company in Support of Objections to Plaintiff's Motion to Produce and First and Second Set of Interrogatories and Motion of Said Defendants Seeking Protective Order filed

Affidavit of J. P. Bowman filed.

Certificate of Service filed

Affidavit of Joseph I. Hendrick filed

July 26—Reply Brief in Support of Plaintiff's Motion to Produce and First and Second Sets of Interrogatories filed

Reply Memorandum of Shell Oil Company to Plaintiff's Opposition to Motion to Strike Certain Portions of Amended Complaint filed

July 29—Reply of Defendants Standard Oil Company and Chevron Asphalt Company to Plaintiff's Memorandum in Opposition to Motion to Dismiss Count II of the Complaint filed

Reply Brief for Defendant Union Oil Company of California in Support of its First Request for Admission, and in Opposition to Plaintiff's Motion to Strike filed

Closing Brief for Defendant Union Oil Company of California in Support of Motions to Dismiss Count Two of the Amended Complaint, to Strike, and for Separate Statement filed

Certificate of Service filed

July 30—Entering proceedings—Various Motions—Discussion re various motions—stipulations to be memorialized in form of Pretrial order *Pence*

July 31—Transcript of Proceedings filed (o) (Hearing of 7-30-68)

Aug. 2—Order filed *Pence*
(re: objections to request for admission of facts)

Aug. 19—Pre-Trial Order No. 3 filed *Pence*

Aug. 23—Second Amended Complaint filed

Sept. 9—Third Amended Complaint filed

Oct. 1—Answers of Shell Oil Company to Written Interrogatories Pursuant to Order of August 19, 1968 filed

Answers of Defendant Union Oil Company of California to Interrogatories Contained in Pretrial Order No. 3 filed

Oct. 2—Answers to the First Set of Interrogatories Propounded by Defendants Standard Oil Company of California and Chevron Asphalt Company filed

Answer to First Request for Admission Propounded to Plaintiff by Defendant Union Oil Company of California filed

Answers to First Interrogatories Propounded to Plaintiff by Defendant Union Oil Company of California filed

Answers to the First Set of Interrogatories Propounded by Defendant Shell Oil Company filed

(Exhibits to be attached to the various interrogatory answers located in large box in the vault)

Oct. 3—Defendants Standard Oil Company of California's and Chevron Asphalt Company's Answers to Interrogatories Contained in Pretrial Order No. 3 filed

Affidavit of J. P. Bowman Accompanying the Answers of Defendants Standard Oil Company of California and Chevron Asphalt Company to Interrogatories Contained in Pretrial Order No. 3 filed

Certificate of Service by Mail filed

Oct. 15—Motion of Shell Oil Company to Strike Certain Allegations of Count One and to Dismiss Count Two and Count Three of the Third Amended Complaint filed

Oct. 16—Motion of Defendant Union Oil Company of California to Dismiss or Strike Count One and to Dismiss Counts Two and Three of the Third Amended Complaint, and in the Alternative to Strike filed

Memorandum of Defendant Union Oil Company of California in Support of its Motions Directed to the Third Amended Complaint filed

Certificate of Service filed

Affidavit of C. E. Rathbone in Support of Defendant Union Oil Company of California's Motion Relative to Count Three of the Third Amended Complaint filed.

Oct. 17—Notice of Motion and Motion of Shell Oil Co. to Strike Plaintiff's Answers to Interrogatories, to Compel Further Answers and for Expenses filed

Notice of Motion and Motion of Defendants Standard Oil Company of California and Chevron Asphalt Company for an Order Dismissing Counts Two and Three of the Third Amended Complaint filed

Statement of Standard Oil Company of California and Chevron Asphalt Company that Said Defendants

Join in the Motions to Strike and to Strike or Dismiss filed by Shell Oil Company and Union Oil Company of California filed

Joint Memorandum of Defendants in Support of Motion to Dismiss Parens Patriae Claim—Count Two of Third Amended Complaint filed

Joint Memorandum of Defendants in Support of Motion to Dismiss Class Action—Count Three of Third Amended Complaint filed

Certificate of Service by mail filed

Oct. 25—Stipulation Extending Time filed—(Pltf may have to and including 11-4-68 to respond to Shell Oil Co.'s m/compel further answers to interrogatories)

Oct. 29—Statement of Shell Oil Company Joining in Motion to Dismiss Count I filed by Union Oil Company filed

Nov. 1—Stipulation and Order re Date of Hearing filed

Pence

(re: motions to be heard 12-13-68 @ 9:30 a.m. before Judge Pence in San Francisco)

Nov. 4—Stipulation Extending Time filed—to and including 11-18-68

Nov. 6—Stipulation Extending Time filed—plaintiff may have to and including 11-18-68 to respond to deft Shell Oil Co.'s m/to compel further answers to interrogatories.

Notice of Motion of Shell Oil Company to Dismiss Complaint for Failure of Plaintiff to Comply with Discovery Order of This Court and for Expenses filed—set for 11-13-68 @ 10:00 a.m.

Nov. 14—Stipulation Extending Time filed
(re: Pltf has to and including 11-18-68 to respond to Shell Oil Co.'s M/Dismiss complaint—further stipulated that hearing said motion be held on 12-13-68)

Nov. 18—Memorandum in Opposition to Shell's Motion to Dismiss for Failure to Comply with Discovery Orders filed

Nov. 19—Plaintiff's Memorandum in Opposition to Defendants' Motions Directed to the Third Amended Complaint filed

Memorandum of Plaintiff in Opposition to Defendant Union Oil Company's Separate Motion Directed to the Third Amended Complaint filed

Memorandum in Opposition to Shell's Motion to Strike Plaintiff's Answer to Interrogatories filed

Certificate of Mailing filed

Dec. 3—Reply to Plaintiff's Opposition to Motions Regarding Plaintiff's Failure to Comply with Discovery Orders filed

Dec. 5—Joint Memorandum for all Defendants in Support of Defendants' Motions Directed to the Third Amended Complaint filed

Dec. 13—Entering proceedings—Defendants Motions as to Dismissal of Certain Parts of Complaint—argument—motions submitted—(C. von Savoye) *Pence*

1969

Jan. 29—Reporter's Transcript filed (von Savoye—12-13-68)

Feb. 24—Memorandum Decision on Defendants' Motions to Dismiss or Alternatively to Strike Certain Allegations of Count One and to Dismiss Count Two and Count Three of the Third Amended Complaint filed (parties notified)

Mar. 5—Fourth Amended Complaint filed

Mar. 19—Stipulation filed *Pence*
(re: 4th amended complaint)

Apr. 21—Motion of Defendants to Strike Paragraph 16(f) of the Fourth Amended Complaint, and Memorandum of Points and Authorities filed

Brief of Defendants Shell Oil Company and Union Oil Company of California in Support of Motion to Dismiss Counts II and III of the Fourth Amended Complaint filed

Memorandum of Points and Authorities in Support of Motions Directed to Count II and Count III of the Fourth Amended Complaint filed

Joint Motion of Defendants Shell and Union for Change of Venue, and Supporting Memorandum and Affidavits, Appendix 1 (Narrative Summary of Typical Prejudicial Publicity) and Exhibit A (Representative Sampling of Prejudicial Publicity) filed

May 5—Plaintiff's Memorandum in Support of Counts Two and Three of the Fourth Amended Complaint filed

Memorandum of Plaintiff in Opposition to Motion of Defendants to Strike Paragraph 16(f) of the Fourth Amended Complaint filed

Plaintiff's Brief in Opposition to the Joint Motion of Defendants Shell and Union for Change of Venue filed

May 8—Motion for Leave to File a Motion to Produce Pursuant to Rule 34 of the Federal Rules of Civil Procedure filed

May 23—Plaintiff's Supplemental Brief in Opposition to Defendants' Motion to Strike Paragraph 16(f) of the Fourth Amended Complaint filed

Reply Memorandum In Support of Motions Directed to Count II and Count III of the Fourth Amended Complaint filed

May 29—Reply Memorandum for Defendants Shell Oil Company and Union Oil Company of California in Support of Their Motion to Transfer filed

Entering proceedings—Various Motions—argument—defts' M/Change of Venue denied without prejudice—M/Dismiss Count II of the complaint denied without prejudice—defts' M/Dismiss Count III of the Complaint granted—defts' M/Certification of denial of the M/Change of Venue and to Dismiss Count II of the Complaint granted—Defts' M/Strike Sec. 16(F) of the Complaint granted w/Leave to Amend—Court to file memorandum decision—(DO) *Pence*

June 4—Order Vacating Oral Order re Certification filed (copy of order mailed to parties) *Pence*

June 5—Amendment to Paragraph 16(f) of the Fourth Amended Complaint filed

June 10—Transcript of Proceedings filed (5-29-69—D. Orndoff)

June 19—Stipulation Re Plaintiff's Motion for Leave to File a Motion to Produce Under Rule 34 filed *Pence*

July 1—Supplemental Answers to the First Set of Interrogatories Propounded by Defendant Shell Oil Company, Appendix A and Appendix B Filed (Appendix A and B located in vault)

July 2—Decision on Plaintiff's Parens Patriae Count filed *Pence*

(re: deft's M/Dismiss Count II denied)

cc: AG, State of Hawaii, R. Vitousek, W. Swope, F. Padgett

Order and Certification for Interlocutory Appeal Under Section 1292(b) of Title 28 of the United States Code filed *Pence*

(re: M/Change of Venue denied; M/Strike par 16(f) of 4th Amended Complaint granted with leave to amend; Deft's M/Dismiss Count II of 4th Amended Complaint denied; Defts' M/Dismiss Ct. III of 4th Amended Complaint granted without prejudice; court certifies order denying defts' motion to dismiss Ct. II of complaint for interlocutory appeal under section 1292(b) of Title 28 USC)

cc: distributed to same attys as above (also to D. Case, Esq)

July 28—Stipulation Extending Time filed *Pence*

(re: all defts have to and including 8-12-69 to answer pltf's 4th amended complaint)

Pre-Trial Order Number 4 filed *Pence*

July 30—Order filed (granting Petition for Permission to Appeal under 28 USC Sec. 1292(b)) (US Court of Appeals for 9th Circuit) notified AG, State of Hawaii, Mr. Vitousek, Mr. Swope, Mr. Padgett & Mr. Case

Aug. 1—Bond for Costs filed

Aug. 6—Bond for Costs filed

Aug. 8—Stipulation Extending Time filed *Pence*
(re: All defts shall answer pltf's 4th amended complaint within 30 days after final determination of interlocutory appeal with respect to denial of deft's M/Dismiss Count II of 4th amended complaint)

Aug. 18—Motion of Shell Oil Company to Dismiss The Complaint For Failure of The Plaintiff to Answer Interrogatories and For Expenses filed

Stipulation Pursuant to Rule 11(f) of the Federal Rules of Appellate Procedure filed

Aug. 19—Motion for Leave to File Notice of Depositions filed

Order filed (granting above motion) *Pence*

cc: AG State of Hawaii; Gilbert E. Cox; Frank D. Padgett; Roy A. Vitousek, Jr.; Daniel H. Case

Aug. 21—Plaintiff's Reply to Shell Oil Company's Motion to Dismiss filed

Aug. 25—Notice of Taking Depositions filed

Aug. 28—Notice to Take Depositions filed

Sept. 2—Shell Oil Company's Reply to Plaintiff's Opposition to Shell's Motion to Dismiss filed

[April 1, 1968]

In the United States District Court
for the District of Hawaii

No. 2826

State of Hawaii,
Plaintiff,

vs.

Standard Oil Company of California,
Union Oil Company of California,
and Shell Oil Company,
Defendants.

COMPLAINT
(Sherman Antitrust Act)
(Jury Demanded)

The above-named plaintiff files this complaint against the above-named defendants and, demanding trial by jury, complains and alleges as follows:

COUNT ONE

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the named defendants under Sections 4 and 16 of the Clayton Act (15 U.S.C. 12, 26) and under Sections 11 and 13, Chapter 205A of the Revised Laws of

Hawaii 1955, as amended, to secure damages from and injunctive relief against the named defendants for violations of the antitrust laws as hereinafter alleged.

2. Each defendant maintains an office, transacts business, and is found within the District of Hawaii, and is within the jurisdiction of the Court for the purposes of service.

II

The Parties

3. The State of Hawaii is one of the sovereign states which through its various departments, agencies, institutions, universities and boards has been a substantial purchaser of refined petroleum products, including without limitation, gasoline and asphalt.

4. Standard Oil Company of California, a Delaware corporation, with its principal offices located in San Francisco, California, is hereby named a defendant herein.

5. Union Oil Company of California, a California corporation, with its principal offices located in Los Angeles, California, is hereby named a defendant herein.

6. Shell Oil Company, a Delaware corporation, with its principal offices located in New York, New York, is hereby named a defendant herein.

III

Co-Conspirators

7. Other persons, firms or corporations participated as co-conspirators in violation of the antitrust laws hereinafter alleged.

IV

Nature of Trade and Commerce

8. Each of the defendants is an integrated oil company engaged in the business of purchasing and producing crude oil, transporting crude oil and refined petroleum products, refining crude into refined petroleum products and in the wholesale and retail sale of refined petroleum products.

9. The only commercial oil refinery in the State of Hawaii is owned by defendant Standard. Substantially all of the crude oil refined at said refinery is imported into Hawaii, under applicable Federal regulations, primarily from Far Eastern countries.

10. The refined petroleum products, including gasoline, produced at said refinery are distributed by defendant through service station and other outlets most of which are operated by lessee dealers. Some refined petroleum products are sold by Standard directly to Federal, State and Municipal government agencies. Substantial quantities of gasoline are shipped from the Hawaii refinery to the mainland for sale and distribution there. Finally, Standard supplies refined petroleum products to the other defendants and other major integrated oil companies for their resale and/or distribution in Hawaii.

11. Each of the defendants ships refined petroleum products, including gasoline, from the mainland to Hawaii for resale and/or further distribution in Hawaii or elsewhere.

12. Gasoline represents approximately 90% in terms of dollar value, of the refined petroleum products sold by

each defendant through service stations. By means of various provisions in their leases, subleases and supply contracts with service station operators, and in other ways, each defendant has been able to and does dominate and control the manner in which independent service station operators conduct their respective businesses. Each defendant effectively controls the price at which most dealers sell gasoline; each controls the hours of operation of the independent dealers; each controls the details of bookkeeping, accounting procedures and records; each controls the manner in which the dealer displays and advertises merchandise as well as the type, quality and brands of automotive accessories and miscellaneous merchandise and the price thereof which the dealer handles and sells and many other details of the dealers' business affairs. Each defendant compels and controls dealer participation in regional, national and local promotional programs such as the giving of stamps, steak knives, glasses and game tickets. This domination and control over the dealers is enforced by each defendant through a system of policing which subjects the dealer to inspection, surveillance and harassment by dealer representatives and others.

13. During the period covered by this complaint there has been a continuous and regular flow in foreign commerce of crude oil obtained from sources outside the State of Hawaii through the Standard refinery in Hawaii producing gasoline and other refined petroleum sold to service stations and others in Hawaii and on the mainland.

V

Offenses Charged

14. Beginning at a time unknown to plaintiff, and continuing thereafter, up to and including the date hereof, defendants entered into unlawful contracts, and a combination and conspiracy in unreasonable restraint of trade and commerce in the sale, marketing and distribution of refined petroleum products and said defendants have combined and conspired as herein set forth to monopolize, and said defendants have monopolized such trade and commerce in violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act (15 U.S.C., secs. 1 and 2) and Sections 2 and 7 of Chapter 205A of the Revised Laws of Hawaii 1955, as amended.

15. The aforesaid contracts, combination and conspiracy to restrain trade and commerce, and the combination and conspiracy to monopolize and the monopolization of such trade and commerce, have consisted of a continuing agreement and concert of action between defendants the substantial terms, purposes and intent of which have been that said defendants and the co-conspirators:

(a) agreed to fix, stabilize and establish wholesale and resale prices on gasoline;

(b) agreed to fix, stabilize and establish prices for liquid asphalt;

(c) agreed to rig bids on the sale of gasoline and liquid asphalt to the State of Hawaii, its political sub-

divisions, or to contractors submitting bids to the State and its political subdivisions;

(d) agreed to restrict the number of refiners of crude oil in Hawaii;

(e) agreed to purchase or assign import quotas for foreign crude and to exchange refined petroleum products among themselves so as (i) to exclude actual and/or potential competitors and (ii) to maintain high, arbitrary prices;

(f) agreed to price refined petroleum products in Hawaii on the basis of posted crude oil prices on the mainland even though most of the refined petroleum products sold in Hawaii are produced from lower price foreign crude oil.

VI

Injury to Plaintiff

16. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize, and monopolization have resulted in the plaintiff through its respective departments, institutions, agencies, etc., paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage; and when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein.

COUNT TWO

17. Plaintiff realleges the matters set out in paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13 of Count One

herein with the same force and effect as though the allegations of each of said paragraphs were set forth in full herein.

18. Beginning at a time unknown to plaintiff and continuing thereafter up to and including the date hereof, each defendant has violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) and Section 1.1, Chapter 205A, Revised Laws of Hawaii 1955, as amended, by charging higher prices for gasoline of like grade and quality sold at wholesale in Hawaii than charged for gasoline of the same grade and quality sold by each of said defendants at major West Coast cities, including but not limited to San Francisco and Los Angeles.

19. The effect of such price discriminations has been and may be to substantially lessen competition and tend to create a monopoly in the production, distribution and sale of refined petroleum products, principally gasoline, in the State of Hawaii and further to injure, destroy and prevent competition in said line of commerce in said State.

20. The gasoline subject to the unlawful discrimination alleged in the preceding paragraphs has moved and moves directly in interstate commerce from refinery facilities of defendants in California to Hawaii.

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the defendants (a) have combined in restraint of trade and commerce hereinbefore described; (b) have combined to monopolize; (c) have actually monopolized the trade and commerce hereinbefore described in violation of Sections

1 and 2 of the Sherman Act and Sections 2 and 7 of Chapter 205A, Revised Laws of Hawaii 1955, as amended; and (d) have unlawfully discriminated in price in violation of 15 U.S.C. 13(a) and Section 1.1 of Chapter 205A, Revised Laws of Hawaii 1955, as amended.

2. That plaintiff recover its damages, which, when ascertained, be trebled as required by Section 4 of the Clayton Act;

3. That defendants and each of them be enjoined from continuing their unlawful conduct;

4. That plaintiff be awarded reasonable attorneys' fees as provided by Section 4 of the Clayton Act; and

5. That plaintiff recover the costs of litigation as provided by Section 4 of the Clayton Act.

Dated: Honolulu, Hawaii, April 1, 1968.

State of Hawaii
By Bert T. Kobayashi
Attorney General
Gilbert K. Hara
Patricia Kim
Douglas S. Hasegawa
Deputy Attorneys General
Joseph L. Alioto
Maxwell M. Blecher
Lawrence Alioto
By /s/ Gilbert K. Hara
By /s/ Maxwell M. Blecher
Attorneys for Plaintiff.

[Sept. 6, 1968]

[Title omitted in printing]

THIRD AMENDED COMPLAINT

(Sherman Anti-trust Act)

(Jury Demanded)

The above-named plaintiff files this complaint against the above-named defendants and, demanding trial by jury, complains and alleges as follows:

COUNT ONE

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the named defendants under Sections 4 and 16 of the Clayton Act (15 U.S.C. 12, 26), to secure damages from, and injunctive relief against, the named defendants for violations of the antitrust laws as hereinafter alleged.

2. Each defendant maintains an office, transacts business, and is found within the District of Hawaii, and is within the jurisdiction of the Court for the purposes of service.

II

The Parties

3. The State of Hawaii is one of the sovereign states which through its various departments, agencies, institutions, universities and boards has been a substantial purchaser of refined petroleum products, including without limitation, motor gasoline and asphalt.

4. Standard Oil Company of California (hereinafter, Standard), a Delaware corporation, with its principal offices located in San Francisco, California, hereby is named a defendant herein.

5. Chevron Asphalt Company (hereafter, Chevron), a Delaware corporation, with its principal offices in San Francisco, California, a wholly-owned subsidiary of Standard Oil Company of California, hereby is named a defendant herein.

6. Union Oil Company of California (hereafter, Union), a California corporation, with its principal offices located in Los Angeles, California, hereby is named a defendant herein.

7. Shell Oil Company (hereafter, Shell), a Delaware corporation, with its principal offices located in New York, New York, hereby is named a defendant herein.

III

Co-Conspirators

8. Other persons, firms or corporations participated as co-conspirators in violation of the antitrust laws hereinafter alleged.

IV

Nature of Trade and Commerce

9. Each of the defendants is an integrated oil company engaged in the business of purchasing and producing crude oil, transporting crude oil and refined petroleum products, refining crude into refined petroleum products and in the wholesale and retail sale of refined petroleum products.

10. The only commercial oil refinery in the State of Hawaii is owned by defendant Standard. Substantially all of the crude oil refined at said refinery is imported into Hawaii, under applicable Federal regulations, primarily from Far Eastern countries.

11. The refined petroleum products, including motor gasoline, produced at said refinery are distributed by defendant through service station and other outlets most of which are operated by lessee dealers. Some refined petroleum products are sold by Standard and/or Chevron directly to Federal, State and Municipal government agencies. Substantial quantities of motor gasoline are shipped from the Hawaii refinery to the mainland for sale and distribution there. Finally, Standard supplies refined petroleum products to the other defendants and other major integrated oil companies for their resale and/or distribution in Hawaii.

12. Each of the defendants ships refined petroleum products, including motor gasoline, from the mainland to Hawaii for resale and/or further distribution in Hawaii or elsewhere.

13. Motor gasoline represents approximately 90% (in terms of dollar value) of the refined petroleum products sold by each defendant through service stations. By means of various provisions in their leases, subleases and supply contracts with service station operators, and in other ways, each defendant has been able to and does dominate and control the manner in which independent service station operators conduct their respective businesses. Each defendant effectively controls the price at which most dealers sell gasoline; each controls the hours

of operation of the independent dealers; each controls the details of bookkeeping, accounting procedures and records; each controls the manner in which the dealer displays and advertises merchandise as well as the type, quality and brands of automotive accessories and miscellaneous merchandise and the price thereof which the dealer handles and sells and many other details of the dealers' business affairs. Each defendant compels and controls dealer participation in regional, national and local promotional programs such as the giving of stamps, steak knives, glasses and game tickets. This domination and control over the dealers is enforced by each defendant through a system of policing which subjects the dealer to inspection, surveillance and harassment by dealer representatives and others.

14. During the period covered by this amended complaint there has been a continuous and regular flow in foreign commerce of crude oil obtained from sources outside the State of Hawaii through the Standard refinery in Hawaii producing motor gasoline and other refined petroleum products sold to service stations and others in Hawaii and on the mainland.

V

Offenses Charged

15. Beginning at a time unknown to plaintiff, and continuing thereafter up to and including the date hereof, defendants entered into unlawful contracts, and a combination and conspiracy in unreasonable restraint of trade and commerce in the sale, marketing and distribution of refined petroleum products and said defendants

have combined and conspired as herein set forth to monopolize, and said defendants have monopolized, such trade and commerce in violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act (15 U.S.C. Sections 1 and 2).

16. The aforesaid contracts, combination and conspiracy to restrain trade and commerce, and the combination and conspiracy to monopolize and the monopolization of such trade and commerce, have consisted of a continuing agreement and concert of action between defendants the substantial terms, purposes and intent of which have been that said defendants and the co-conspirators:

(a) agreed to fix, stabilize and establish unreasonably high wholesale and resale prices on motor gasoline and other refined petroleum products;

(b) agreed to maintain and enforce resale prices on motor gasoline;

(c) agreed to fix, stabilize and establish unreasonably high prices for liquid asphalt;

(d) agreed to rig bids on the sale of motor gasoline, liquid asphalt and other refined petroleum products to the State of Hawaii, its political subdivisions, or to contractors submitting bids to the State and its political subdivisions;

(e) agreed to restrict the number of refiners of crude oil in Hawaii;

(f) agreed to purchase or assign import quotas for foreign crude and to exchange refined petroleum products among themselves in order to: (i) exclude actual

and/or potential competitors, and (ii) maintain high, arbitrary prices;

(g) agreed to price refined petroleum products in Hawaii on the basis of posted crude oil prices on the mainland even though most of the refined petroleum products sold in Hawaii are produced from lower priced foreign crude oil.

VI

Injury to Plaintiff

17. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize, and monopolization have resulted in the plaintiff, through its respective departments, institutions, agencies, etc., paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage. However, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein.

COUNT TWO

18. The above-named plaintiff, acting in its capacity as *parens patriae,* and/or as trustee for the use of its citizens who purchased refined petroleum products, from any defendant or co-conspirator herein, realleges the matters set out in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Count One herein with the same force and effect as though the allegations of each of said paragraphs were set forth in full herein.

19. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination and conspir-

acy to monopolize, and monopolization have resulted in the plaintiff, through its respective departments, institutions, agencies, etc. and in its citizens, paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens, however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein.

COUNT THREE

20. The above-named plaintiff, acting on its own behalf and on behalf of its citizens who purchased refined petroleum products from any or all of the above-named defendants or co-conspirators, brings this action individually and pursuant to Rule 23 of the Federal Rules of Civil Procedure, as amended, as the representative of the aforesaid class, to obtain damages from, and equitable relief against, the above-named defendants; and so doing, plaintiff realleges the matters set out in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Count One herein with the same force and effect as though the allegations of each of said paragraphs were set forth in full herein.

21. The nature of the offenses charged, commerce involved, and relief sought present substantial questions of both law and facts common to the named plaintiff and to all of the members of the class. Because of the large number of citizens of the State of Hawaii who have purchased motor gasoline and other refined petroleum products from the named defendants and/or their retail dealers and other co-conspirators and because of the

expense and burden to the parties and to the Court of litigating their claims separately, it is impracticable to bring them all before the Court. The named plaintiff, however, fairly insures the adequate representation of the interests of the entire class.

22. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize, and monopolization have resulted in the plaintiff, through its respective departments, institutions, agencies, etc., and in its citizens, paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein.

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the defendants (a) have combined in restraint of trade and commerce hereinbefore described; (b) have combined to monopolize; (c) actually have monopolized the trade and hereinbefore described in violation of Sections 1 and 2 of the Sherman Act;

2. That plaintiff recover its damages, which, when ascertained, be trebled as required by Section 4 of the Clayton Act;

3. That plaintiff recover, as trustee or as representative of the above-pleaded class, the damages sustained by its citizens, which, when ascertained, be trebled as required by Section 4 of the Clayton Act;

4. That defendants and each of them be enjoined from continuing their unlawful conduct;

5. That plaintiff be awarded reasonable attorneys' fees as provided by Section 4 of the Clayton Act; and

6. That plaintiff recover the costs of litigation as provided by Section 4 of the Clayton Act.

Dated: September 6, 1968.

State of Hawaii
By Bert T. Kobayashi,
Attorney General

Gilbert K. Hara
Patricia Kim Park
Douglas S. Hasegawa
Deputy Attorneys General

Joseph L. Alioto
Maxwell M. Blecher
Francis O. Scarpulla
By /s/ Francis O. Scarpulla

[Oct. 14, 1968]

[Title omitted in printing]

NOTICE OF MOTION AND MOTION OF DEFENDANTS STANDARD OIL COMPANY OF CALIFORNIA AND CHEVRON ASPHALT COMPANY FOR AN ORDER DISMISSING COUNTS TWO AND THREE OF THIRD AMENDED COMPLAINT

To State of Hawaii and to Bert T. Kobayashi, Gilbert K. Hara, Patricia Kim Park, Douglas S. Hasegawa, Joseph L. Alioto, Maxwell M. Blecher, Lawrence Alioto and Francis O. Scarpulla, its attorneys:

Please take notice that on the 13th day of November, 1968, at 10 o'clock A.M., or as soon thereafter as counsel can be heard, defendants STANDARD OIL COMPANY OF CALIFORNIA and CHEVRON ASPHALT COMPANY will bring the following motion on for hearing before the above-entitled Court at the United States Court House in Honolulu, Hawaii.

MOTION

Defendants Standard Oil Company of California and Chevron Asphalt Company pursuant to Rules 12(b)(6) and 23(c)(1) of the Federal Rules of Civil Procedure hereby move this Court for an order dismissing Counts Two and Three of the complaint on the grounds that said Counts Two and Three fail to state claims upon which relief can be granted, and on the ground that Count Three fails to meet the prerequisites of Rule 23. This motion is based upon the foregoing notice of motion; the joint memorandum of defendants in support of motion to dismiss parens patriae claim—Count Two of third amended complaint; the joint memorandum of defendants in

support of motion to dismiss class action—Count Three of third amended complaints; the affidavits of A. E. Stevens, J. W. Phegley, Otto Hoefler, W. L. Sanor and the various retail dealers submitted in support of the motion to dismiss Count Three; and upon all the records and papers on file with the Clerk of the above-entitled Court in the above-entitled action.

Dated: October 14, 1968.

Pillsbury, Madison & Sutro
Francis R. Kirkham
Richard J. MacLaury
James B. Atkin
Pratt, Moore, Bortz & Case
Daniel H. Case
Roy A. Vitousek Jr.
By /s/ Francis R. Kirkham
Attorneys for Defendants Standard Oil Company of California and Chevron Asphalt Company

[Oct. 15, 1968]

[Title omitted in printing]

MOTION TO STRIKE CERTAIN ALLEGATIONS OF COUNT ONE AND TO DISMISS COUNT TWO AND COUNT THREE OF THE THIRD AMENDED COMPLAINT

COUNT ONE

I. Pursuant to Rule 12 of the Federal Rules of Civil Procedure, SHELL OIL COMPANY (Shell), a defendant in this action, by its attorney herein moves to strike from Count One of the Third Amended Complaint the following:

A. All references to the wholesale aspects of the gasoline marketing industry on the grounds that the plaintiff has no interest in and can make no claim concerning that aspect of gasoline marketing since it makes no purchases at that level;

B. All references to crude oil import quotas inasmuch as the formation and administration of those quotas are immune from attack in this lawsuit; and

C. All references to "refined petroleum products" in that the interests of the plaintiff do not include any product other than gasoline and liquid asphalt.

In support of each of the above motions, Shell relies on its Memorandum in support of like motions to strike

like allegations from the First Amended Complaint (See Memorandum dated June 24, 1968, pp. 2-17).

COUNT TWO

II. Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Shell moves to dismiss Count Two of the Third Amended Complaint on the grounds that (1) no *parens patriae* cause of action by plaintiff can or does exist with respect to the matters alleged; and (2) no such cause of action has in fact been properly alleged by the plaintiff as "parens patriae."

In support of the above motion Shell relies on the Joint Memorandum in Support of Defendants' Motion to Dismiss Count Two of the Third Amended Complaint, dated October 15, 1968.

COUNT THREE

III. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Shell herein moves to dismiss Count Three of the Third Amended Complaint on the ground that it fails to comport with the requirements for a class action and would further create impossible burdens of management. The affidavit of D. Campbell Ross, attached hereto as Exhibit A, is filed in support of this motion.

In support of the above motions Shell relies on the Joint Memorandum in Support of Defendants' Motions to

Dismiss Count Three of the Third Amended Complaint, dated October 15, 1968.

Respectfully submitted,

/s/ William Simon

William Simon
Richard T. Colman
Howrey, Simon, Baker & Murchison
1707 H Street, N. W.
Washington, D. C. 20006

Gilbert E. Cox
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Honolulu, Hawaii 96808

S. R. Vandivort
50 West 50th Street
New York, New York 10020
Attorneys for Defendant
SHELL OIL COMPANY

Dated: October 15, 1968.

AFFIDAVIT OF D. CAMPBELL ROSS

County of Honolulu
State of Hawaii—ss

D. Campbell Ross, being first duly sworn on oath deposes and says:

1. I am and have been for several years State Manager in Hawaii for SHELL OIL COMPANY (Shell).

2. In connection with my duties as State Manager I am responsible for all Shell's sales of gasoline and related refined petroleum products in Hawaii.

3. The sale of gasoline to the State of Hawaii by Shell is entirely on competitive bids submitted to the State by Shell and others on a sealed bid basis. The formation of Shell's bid price is in no way related to or dependent upon the price charged at wholesale by Shell or the prices charged by its dealers at retail, except that at the request of the State the bid price may be stated as a discount from Shell's posted tank wagon price. Rather, the said bid prices are formulated individually for the State upon Shell's estimate of a successful competitive price and other competitive factors relating to the supply and demand for gasoline. The current bid price submitted by Shell to the State and on which it is now selling gasoline to the State in Oahu is 16¢ to 17¢ a gallon below the average or mean posted retail price charged at service stations selling Shell brand gasoline on Oahu. The State of Hawaii owns and utilizes its own gasoline storage facilities.

4. The State of Hawaii does pay certain credit card invoices on purchases at retail from Shell dealers. Credit card purchases from Shell dealers account for a very small percentage of the purchases made by the State. In the

month of October, 1967, credit card invoices show that the State purchased petroleum products, including products other than gasoline, on Shell credit cards, in the total amount of $556.12. Most of those purchases were on the Island of Molokai. Excluding Molokai purchases, the State's total purchases that month on Shell credit cards were only $85.30. This represents no more than 200 gallons of gasoline. This is a typical month for the State's purchases from Shell. In that same month, Shell sold the State 47,000 gallons of gasoline on bid, making the Shell credit card purchases 0.04% of the State's purchases from Shell. Shell's total monthly sales in Hawaii are about 4 million gallons.

5. Only the City and County of Honolulu, the Federal Government and certain large commercial plantations also purchase from Shell upon a sealed bid basis.

6. Approximately 85%-90% of the motor gasoline sold by Shell in Hawaii is sold for the purpose of resale at retail to motorists. Approximately 40% of that volume is sold for resale to motorists at Post Exchanges and Ships Stores. There were about 670 service stations of all brands in the State of Hawaii in 1966. About 122 of that number were Shell branded stations. In addition to Shell stations there have been during the period of the last four years also stations supplied by the following companies: Standard, Time Oil Company, Union, Flying A (Tidewater), Phillips, Texaco and Armour.

7. I have been the senior Shell marketing person in Hawaii for more than five years. Throughout that time Shell has never controlled, fixed or set, nor sought to control, fix, or set, the resale price for gasoline sold by any of its independent service station dealers. To the contrary,

all Shell dealers have been and are told by Shell that they are free to determine their own prices for gasoline in response to their own judgment of competition and other factors and each of such dealers in fact determines his resale price free of any control by Shell. It has continually been my observation that gasoline prices often vary at some service stations from time to time. The prices at which gasoline is sold at Post Exchanges and Ships Stores have been observed to be as low as 29.9¢ for regular grade gasoline.

8. The wholesale or tank-wagon price charged Shell dealers for regular grade gasoline in Oahu is 1¢ higher than the tank-wagon price charged Shell dealers in Phoenix, Arizona and Reno, Nevada. It is 2¢ per gallon higher than the tank-wagon price charged Shell dealers in San Francisco or Los Angeles. The mean retail price in Honolulu of 42.4¢ for a gallon of regular grade gasoline [an average of the two most frequently posted prices of 41.9 and 42.9] is 8.5¢ higher than the mean price of 33.9¢ per gallon charged in California.

9. On August 12 and 13, 1968, I caused Shell employees working under my direction to make a full survey of the retail prices posted at all service stations in Hawaii. The following are the prices observed for regular grade gasoline in Oahu:

35.9	40.0	41.1	42.1	42.9	45.9
37.8	40.1	41.3	42.2	43.0	46.1
37.9	40.4	41.4	42.3	43.5	46.3
38.5	40.5	41.5	42.5	43.9	
38.9	40.8	41.7	42.6	44.3	
39.5	40.9	41.9	42.7	44.9	
39.9	41.0	42.0	42.8	45.1	

The following were some of the discounts and promotions observed then being offered:

1¢ off for $2.00 purchase;

Free coke with 10 gallons;

Gold Bond, Mahalo and Royal Stamps in single, double and triple and quadruple relations to amounts purchased;

Two, three, four and five cents discounts;

Free car wash;

Six cents military discounts.

10. It is my belief based on many years' experience in Hawaii that almost every service station in Oahu gives at least some of its customers, though not necessarily to all customers or in the same amount to all customers, a discount, promotion or give-away.

11. Shell does not sell paving asphalt to the State of Hawaii. It sells paving asphalt only to distributors and contractors. The State, in turn, purchases paving in place from contractors which includes paving asphalt mixed with aggregate and laid in place as part of a finished job, in connection with a bid contract, including within the bid price all of the various other materials and labor costs that are part of the completed job.

/s/ D. Campbell Ross

Subscribed and sworn to before me
this 14th day of October, 1968.
Dorothy P. Shimamura
Notary Public
1st Judicial Circuit
State of Hawaii.

My Commission Expires 9/15/70

[Certificate of Service omitted in printing]

[Oct. 15, 1968]

[Title omitted in printing]

MOTION OF DEFENDANT UNION OIL COMPANY OF CALIFORNIA TO DISMISS OR STRIKE COUNT ONE AND TO DISMISS COUNTS TWO AND THREE OF THE THIRD AMENDED COMPLAINT, AND IN THE ALTERNATIVE TO STRIKE.

Defendant Union Oil Company of California moves the Court as follows:

1. To dismiss or strike Count One of the Third Amended Complaint as sham.

2. To dismiss Count Two of the Third Amended Complaint, for failure to state a claim upon which relief can be granted.

3. To determine that Count Three of the Third Amended Complaint may not be maintained as a class action, upon the ground that none of the requirements of F.R.Civ.P. Rule 23 for maintenance of a class action is present, and that, since Count Three serves no purpose other than to attempt to convert Count One into a class action, it should therefore be dismissed.

4. In the event the motion to dismiss or strike Count One as sham be not granted, to strike the following portions of Count One:

(a) paragraph 13 thereof (or in the alternative, all of the allegations of paragraph 13, except the first sentence); and

(b) subparagraph 16(f) thereof, upon the ground that said allegations are and each of them is immaterial and impertinent.

Among the material upon which the motion to dismiss or strike Count One as sham is based are plaintiff's "Answer to First Request for Admission Propounded to Plaintiff by Defendant Union Oil Company of California", plaintiff's "Answers to First Interrogatories Propounded to Plaintiff by Defendant Union Oil Company of California", its "Answers to the First Set of Interrogatories Propounded by Defendants Standard Oil Company of California and Chevron Asphalt Company", and its "Answers to the First Set of Interrogatories Propounded by Defendant Shell Oil Company".

Among the material upon which the motion to determine that Count Three may not be maintained as a class action and should therefore be dismissed is based is the affidavit of C. E. Rathbone filed herewith. All the foregoing motions are also based upon the Third Amended Complaint, the memoranda served and filed herewith, and upon all of the files herein.

Respectfully submitted,
L. A. Gibbons
Douglas C. Gregg
E. A. McFadden
Moses Lasky
Malcolm T. Dungan
Brobeck, Phleger & Harrison
Frank D. Padgett
Padgett, Greeley, Marumoto & Akinaka
By /s/ Moses Lasky
Attorneys for Defendant,
Union Oil Company of California.

October 15, 1968

EXCERPTS FROM REPORTER'S TRANSCRIPT DATED DECEMBER 13, 1968

(Rep.Tr. p. 24, lines 12-22):

[Mr. Blecher] What you really then get down to, when you take all these ancient notions and shift them aside, is whether or not parens patriae constitutes an effective means of the State, acting through its Attorney General, recovering the money that has been taken from the State by reason of a price fixing arrangement applicable to consumers and whether it is simpler to administer that kind of lawsuit on the one hand than to face the administrative problems that have been imposed by the statute under Rule 23 of class action procedure. **[R.T. 24]**

(Rep.Tr. p. 26, lines 4-9):

[Mr. Blecher] This doesn't really get at the issue because we are arguing about something which really never was focused upon in Georgia. We are talking about taking a concept, a legal concept, here and embellishing, if you will, expanding upon it, if you will, crystallizing it so that it becomes a really effective vehicle. **[R.T. 26]**

(Rep.Tr. p. 31, lines 1-21):

[Mr. Blecher] Now parens patriae constitutes, by some slight extension in this case, in our judgment, the single most effective vehicle for doing that. It permits the State, acting as Trustee, to cover whatever may be decided to be the measure of damage to recover some meaningful amount in an instance where the consumer has been—and by consumer I am not limiting it just to the motorist—I am talking about business entities, plantations and others where those people have wrongfully parted with some money and, necessarily, by that wrong-

fully parting, injured the state in its economy, whether it is because they paid less income tax or whether it was because that money was taken out literally—whether the money was actually taken out of the State and brought back to the mainland or some other more esoteric form—but if there was a price-fixing conspiracy, and for purposes of this notion we have to assume that, and if it operated to extract that money, I don't see how the Court could help but conclude as a matter of economic logic that there has been adverse impact upon the State. **[R.T. 31]**

(Rep.Tr. p. 32, lines 4-9):

[Mr. Blecher] What we are really talking about here is some extension of the traditional concepts of parents [sic] patriae. It does involve creative thinking, new thinking and investigation. I think it is time the judiciary addressed itself to this problem in terms of the modern needs of a modern society. **[R.T. 32]**

(Rep.Tr. p. 64, line 23 through p. 65, line 9):

[Mr. MacLaury] Under the circumstances, Your Honor, I say this is not a proper class. It poses more problems than it solves, and I join with Mr. Simon **[R.T. 64]** in saying that this action, in its present form, should be dismissed.

We do not say that there can't be any class action against the oil companies in Hawaii. I don't say there can't be any class action, but I say this one is not a proper class action.

The Court: You are addressing yourself to the one before the Court and that is all?

Mr. MacLaury: Yes. **[R.T. 65]**

(Rep.Tr. p. 95, lines 16-24):

[Mr. Simon] That isn't the issue, Your Honor. The issue is whether there is any possible way that you can establish this class suit, the one that is alleged in this complaint. It may be that this plaintiff could allege a proper class suit with a different class or it may be that a different plaintiff could allege a proper class suit for some of this class. But the only issue before Your Honor today is whether this class suit can be sustained. [R.T. 95]

(Rep.Tr. p. 97, lines 11 through p. 98, line 11):

The Court: You urge the carving must take place at the time of the allegation. Mr. Blecher says you get a later date and carve up the classes. You maintain that the carving must be at least the lines of the cleavage, must be set at the time the allegation is made?

Mr. Simon: Yes, Your Honor. This is their complaint. They had complete freedom to draw whatever classes they chose, and they chose to see that the class was everybody in the State of Hawaii who buys gasoline. This is their choice.

Next he says to you that he wouldn't spend four seconds on the question of whether the 600 service stations in Hawaii create a separate question for each, and yet I say to Your Honor that there is [R.T. 97] no way he can avoid that question, because he says he is talking about a vertical conspiracy. If it was just a horizontal conspiracy of the three defendants, we would have one problem. But he says he is talking about a vertical conspiracy between the defendants and every service station in the Islands. You can't do that by a formula. You can't prove by mass

evidence that the defendants conspired with each of them when their own complaint only says that most of the people were involved. The complaint doesn't even say all of them. [R.T. 98]

(Rep.Tr. p. 98, line 22 through p. 99, line 7):

Mr. Simon: My sentence had a few words more to it. This is a simple little lawsuit if—and it is a big "if"—Your Honor, if all that is involved is whether Standard, Union and Shell conspired on bids to the State. That is not a case that involves [R.T. 98] a great deal of discovery. It should be a simple case to try.

But it is a great deal different if you have to try the question of whether 600,000 motorists buying gasoline at 600 different service stations selling six or seven different brands of gasoline were all involved in one big conspiracy. [R.T. 99]

[Feb. 24, 1969]

In The United States District Court
For The District Of Hawaii

Civil No. 2826

State of Hawaii,
Plaintiff,

vs.

Standard Oil Company of California,
Union Oil Company of California,
Shell Oil Company, and
Chevron Asphalt Company,
Defendants.

MEMORANDUM DECISION ON DEFENDANTS' MOTIONS TO DISMISS OR ALTERNATIVELY TO STRIKE CERTAIN ALLEGATIONS OF COUNT ONE AND TO DISMISS COUNT TWO AND COUNT THREE OF THE THIRD AMENDED COMPLAINT

Plaintiff State of Hawaii is seeking legal and equitable relief from defendants' alleged violations of Sections 1 and 2 of the Sherman antitrust act.[1] Plaintiff's Third Amended Complaint alleges three counts, as follows: Count I charges injury to the plaintiff in its proprietary capacity as the purchaser of "refined petroleum prod-

[1]Title 15 U.S.C. §§ 1 and 2.

uots"[2] from defendants; Count II asserts a cause of action for the State of Hawaii acting in its capacity as *parens patriae*, and/or as trustee for the use of its citizens who purchased refined petroleum products . . .";[3] and Count III pleads a class action under Rule 23, Fed. R. Civ. P., on behalf of plaintiff and "its citizens who purchased refined petroleum products. . . ."[4] Defendants have moved alternatively to strike certain allegations of Count I, and to dismiss Counts II and III.[5] After extensive briefing, and argument on December 13, 1968, this court (a) orally denied defendants' motion to dismiss Count I as a sham, and (b) took the remaining motions under advisement. The oral ruling of December 13, 1968 is herewith AFFIRMED. The court's decisions on the motions taken under advisement are set forth below.

I. *Motions To Strike Certain Allegations of Count I*

Defendants would strike paragraphs 13 (dealing with the wholesaling of gasoline and the relationship between defendants and their service station operators) and 16 (f) ("[Defendants] agreed to purchase or assign import quotas for foreign crude and to exchange refined petroleum products among themselves . . . .") of Count I, and all references in Count I to "refined petroleum products."

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[2]Third Amended Complaint, filed September 9, 1968, at page 7, paragraph 17.

[3]Id. at page 7, paragraph 18.

[4]Id. at page 8, paragraph 20.

[5]See motion of Shell Oil Company filed October 15, 1968; motion of Union Oil Company of California filed October 16, 1968; and motions of Standard Oil Company of California and Chevron Asphalt Company filed October 17, 1968.

A. *Paragraph 13*

Defendants maintain plaintiff's allegation regarding defendants' alleged control and domination of retail outlets are irrelevant since plaintiff purchased gasoline on direct bid. Plaintiff replies that its employees do make occasional service station purchases by credit card. Primarily, however, plaintiff defends its allegations on the ground that *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, (1962) precludes fragmentation of evidence proving the alleged violation.

Plaintiff has alleged a broad conspiracy to monopolize and control sale and distribution of petroleum products, particularly gasoline and liquid asphalt, in the State of Hawaii. Plaintiff contends that an integral part of this scheme is elimination of competing sellers and domination of the marketing of petroleum products, which is partially achieved by manipulation of retailers serving the consuming public. Presumably it is this control over all aspects of petroleum product marketing in Hawaii which is at least one of the factors allegedly enabling defendants to effectively rig sealed bids submitted to the State.

The court can not say at this stage of this proceeding that the allegations of paragraph 13 are in no way relevant or pertinent to plaintiff's proprietary interests. The law permits plaintiff to explore into the totality of the violation alleged. Plaintiff need not segregate and compartmentalize the allegedly all-pervasive conspiracy into solely those aspects having direct bearing on plaintiff's interest. *Continental Ore, supra.* Defendant's motions to strike Count I, paragraph 13, are DENIED.

B. *Paragraph 16(f)*

Defendants contend they are precluded by law from purchasing or assigning import quotas for foreign crude oil imported into this country pursuant to the provisions of the Federal Oil Import Program.[6] Plaintiff conceded that Count I, paragraph 16(f), is inartfully drafted, and does not accurately state its assertions. Defendants' motions to Strike Count I, paragraph 16(f), are Granted, without prejudice to plaintiff to amend its complaint and more precisely indicate its claims.

C. *References To "Refined Petroleum Products"*

Defendants assert plaintiff's interests do not extend to the myriad of petroleum products other than gasoline and liquid asphalt, and have moved that the complaint be so limited. Plaintiff has agreed to limit its discovery requests to those two products. This agreement is embodied in Pre-Trial Order No. 3, paragraph VI (filed August 19, 1968), which provides:

> "Until further order of the Court it is understood that the term 'refined petroleum products' means motor gasoline and liquid asphalt only."

This order of the court, adequately protects all of defendants' legitimate interests. Accordingly, defendants' motions to strike all references to "refined petroleum products" in Count I are Denied.

II. *Motions To Dismiss Count II—Parens Patriae*

Defendants assert that plaintiff has failed to state a cause of action as *parens patriae* on behalf of its citizens,

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[6] 32A Code Fed. Regs., OI Reg. 1, § 7(b) (1968), 31 Fed. Reg. 7745, 7747 (1966).

and move that Count II of the Third Amended Complaint be dismissed. Defendants argue that plaintiff can not prosecute the claims of its citizens, in the guise of *parens patriae,* since the State does not assert any interest apart from and independent of the alleged injury to its individual citizens. Defendants further contend that even if plaintiff has satisfied the requirements of a *parens patriae* complaint, its remedy is limited to whatever equitable sanctions may be available and it may not recover damages.

Plaintiff responds *in its brief and oral argument* that a state may sue *parens patriae* on behalf of a substantial portion of its citizens to vindicate an antitrust violation, which, because of its extensive nature, constitutes a public wrong. Plaintiff contends defendants' statewide pricing conspiracy discriminates against the Hawaiian consumers, thereby injuring the economic well-being of the State over and above the monetary injury to the individual consumers. Plaintiff maintains that all remedies appropriate under the antitrust laws, including that of treble damages, are available to the State of Hawaii in its capacity as *parens patriae.* The following, however, is the totality of plaintiff's *parens patriae* allegations in its complaint:

> "18. The above-named plaintiff, acting in its capacity as *parens patriae,* and/or as trustee for the use of its citizens who purchased refined petroleum products, from any defendant or co-conspirator herein, realleges the matters set out in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Count One herein with the same force and effect as though the allegations of each of said paragraphs were set forth in full herein.

"19. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize, and monopolization have resulted in the plaintiff, through its respective departments, institutions, agents, etc. and in its citizens, paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens, however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

None of the numbered paragraphs, incorporated by reference, deals with *parens patriae*.

In *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), the Supreme Court upheld the right of a state to sue *parens patriae* for redress from antitrust violations in the setting of rail freight rates. The Court discussed the prior law, summarizing and codifying the requirements for a *parens patriae* suit:

> "[T]he interests of the State are not confined to those which are proprietary; they embrace the so-called 'quasi-sovereign' interests which in the words of *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, are 'independent of and behind the titles of its citizens. . . .'
>
> "It seems to us clear that under the authority of these cases Georgia may maintain this suit as *parens patriae* acting on behalf of her citizens. . . .
>
> "If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. . . . They may affect the prosperity and welfare of a State as profoundly as

> any diversion of waters from the rivers. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. . . . Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate." 324 U.S. at 447-51.

Plaintiff has referred to various factors enumerated in *Georgia* in its written and oral argument, but those factors are nowhere indicated or suggested in the allegations of the complaint. Plaintiff has not even alleged an interest in its citizens' claims, much less interest of its own aside from the State's proprietary rights. Thus, plaintiff's Count II totally fails to satisfy the *Georgia* requirements. While in this era of "sketch" pleading, a complaint usually need do no more than summarily apprise defendant of the basis of plaintiff's claims, Count II is deficient even by this liberal standard, and the court can not incorporate plaintiff's argument into its pleading.

This court does *not* here decide that plaintiff could or could not properly plead an action for money damages as *parens patriae,* in these circumstances, or that any sanctions might here be available under such theory. Rather, this court merely says that the allegations set forth in Count II of plaintiff's Third Amended Complaint are insufficient to withstand defendants' motions to dismiss. Accordingly, defendants' motions are Granted, without prejudice to plaintiff to amend its complaint.

III. *Motion To Dismiss Count III—Class Action*

Count III pleads a class action by the State as the representative of its citizens who purchased refined petroleum products. Taking into consideration the context of plaintiff's oral argument on Count II, this court views Count III as overlapping, parallel and/or alternative to the Count II *parens patriae* count dismissed above. Accordingly, the court will withhold ruling on defendants' motions to dismiss Count III until plaintiff has had an opportunity to consider amending its complaint. If an amended complaint is filed, the court will rule on any class action allegations, if any are then before it, in conjunction with any ruling which may be made on motions related to the amended complaint. Plaintiff is granted fifteen (15) days from the filing of this decision within which to file an amended complaint, if plaintiff so desires, but if such is not filed, a ruling on the present Count III will be forthcoming immediately thereafter.

This memorandum decision constitutes the ORDER of the court in the particulars set forth above.

DATED: Honolulu, Hawaii, this 24th day of February, 1969.

/s/ Martin Pence
United States District Judge

[Feb. 27, 1969]

[Title omitted in printing]

FOURTH AMENDED COMPLAINT

(Sherman Anti-trust Act)

(Jury Demanded)

The above-named plaintiff files this complaint against the above-named defendants and, demanding trial by jury, complains and alleges as follows:

COUNT ONE

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the named defendants under Sections 4 and 16 of the Clayton Act (15 U.S.C. 12, 26), to secure damages from, and injunctive relief against, the named defendants for violations of the antitrust laws as hereinafter alleged.

2. Each defendant maintains an office, transacts business, and is found within the District of Hawaii, and is within the jurisdiction of the Court for the purposes of service.

II

The Parties

3. The State of Hawaii is one of the sovereign states which through its various departments, agencies, institutions, universities and boards has been a substantial purchaser of refined petroleum products, including without limitation, motor gasoline and asphalt.

4. Standard Oil Company of California (hereinafter, Standard), a Delaware corporation, with its principal

offices located in San Francisco, California, hereby is named a defendant herein.

5. Chevron Asphalt Company (hereafter, Chevron), a Delaware corporation, with its principal offices in San Francisco, California, a wholly-owned subsidiary of Standard Oil Company of California, hereby is named a defendant herein.

6. Union Oil Company of California (hereafter, Union), a California corporation, with its principal offices located in Los Angeles, California, hereby is named a defendant herein.

7. Shell Oil Company (hereafter, Shell) a Delaware corporation, with its principal offices located in New York, New York, hereby is named a defendant herein.

III

Co-conspirators

8. Other persons, firms or corporations participated as co-conspirators in violation of the antitrust laws hereinafter alleged.

IV

Nature of Trade and Commerce

9. Each of the defendants is an integrated oil company engaged in the business of purchasing and producing crude oil, transporting crude oil and refined petroleum products, refining crude into refined petroleum products and in the wholesale and retail sale of refined petroleum products.

10. The only commercial oil refinery in the State of Hawaii is owned by defendant Standard. Substantially all of the crude oil refined at said refinery is imported into

Hawaii, under applicable Federal regulations, primarily from Far Eastern countries.

11. The refined petroleum products, including motor gasoline, produced at said refinery are distributed by defendant through service station and other outlets most of which are operated by lessee dealers. Some refined petroleum products are sold by Standard and/or Chevron directly to Federal, State and Municipal government agencies. Substantial quantities of motor gasoline are shipped from the Hawaii refinery to the mainland for sale and distribution there. Finally, Standard supplies refined petroleum products to the other defendants and other major integrated oil companies for their resale and/or distribution in Hawaii.

12. Each of the defendants ships refined petroleum products, including motor gasoline, from the mainland to Hawaii for resale and/or further distribution in Hawaii or elsewhere.

13. Motor gasoline represents approximately 90% (in terms of dollar value) of the refined petroleum products sold by each defendant through service stations. By means of various provisions in their leases, subleases and supply contracts with service station operators, and in other ways, each defendant has been able to and does dominate and control the manner in which independent service station operators conduct their respective businesses. Each defendant effectively controls the price at which most dealers sell gasoline; each controls the hours of operation of the independent dealers; each controls the details of bookkeeping, accounting procedures and records; each controls the manner in which the dealer displays and advertises merchandise as well as the type, quality and

brands of automotive accessories and miscellaneous merchandise and the price thereof which the dealer handles and sells and many other details of the dealers' business affairs. Each defendant compels and controls dealer participation in regional, national and local promotional programs such as the giving of stamps, steak knives, glasses and game tickets. This domination and control over the dealers is enforced by each defendant through a system of policing which subjects the dealer to inspection, surveillance and harassment by dealer representatives and others.

14. During the period covered by this amended complaint there has been a continuous and regular flow in foreign commerce of crude oil obtained from sources outside the State of Hawaii through the Standard refinery in Hawaii producing motor gasoline and other refined petroleum products sold to service stations and others in Hawaii and on the mainland.

V

Offenses Charged

15. Beginning at a time unknown to plaintiff, and continuing thereafter up to and including the date hereof, defendants entered into unlawful contracts, and a combination and conspiracy in unreasonable restraint of trade and commerce in the sale, marketing and distribution of refined petroleum products and said defendants have combined and conspired as herein set forth to monopolize, and said defendants have monopolized such trade and commerce in violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act (15 U.S.C. Sections 1 and 2).

16. The aforesaid contracts, combination and conspiracy to restrain trade and commerce, and the combination and conspiracy to monopolize and the monopolization of such trade and commerce, have consisted of a continuing agreement and concert of action between defendants the substantial terms, purposes and intent of which have been that said defendants and the co-conspirators:

(a) agreed to fix, stabilize and establish unreasonably high wholesale and resale prices on motor gasoline and other refined petroleum products;

(b) agreed to maintain and enforce resale prices on motor gasoline;

(c) agreed to fix, stabilize and establish unreasonably high prices for liquid asphalt;

(d) agreed to rig bids on the sale of motor gasoline, liquid asphalt and other refined petroleum products to the State of Hawaii, its political subdivisions, or to contractors submitting bids to the State and its political subdivisions;

(e) agreed to restrict the number of refiners of crude oil in Hawaii;

(f) agreed to exchange import quotas for foreign crude and to exchange refined petroleum products among themselves in order to: (i) exclude actual and/or potential competitors, and (ii) maintain high, arbitrary prices;

(g) agreed to price refined petroleum products in Hawaii on the basis of posted crude oil prices on the mainland even though most of the refined petroleum products sold in Hawaii are produced from lower priced foreign crude oil.

VI

Injury To Plaintiff

17. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination, and conspiracy to monopolize, and monopolization have resulted in the plaintiff, through its respective departments, institutions, agencies, etc., paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage. However, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein.

COUNT TWO

18. The facts alleged in paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Count One are realleged with the same force and effect as though the allegations of each of said paragraphs were set forth in full herein.

19. The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.

20. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization, hereinbefore alleged, have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:

(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;

(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;

(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

(d) the full and complete utilization of the natural wealth of the State has been prevented;

(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

(g) the Hawaii economy has been held in a state of arrested development.

21. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein.

COUNT THREE

22. The above-named plaintiff, acting on its own behalf and on behalf of its citizens who purchased refined petroleum products from any or all of the above-named defendants or co-conspirators, brings this action individually and pursuant to Rule 23 of the Federal Rules of Civil Procedure, as amended, as the representative of the aforesaid class, to obtain damages from, and equitable

relief against, the above-named defendants; and so doing, plaintiff realleges the matters set out in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Count One herein with the same force and effect as though the allegations of each of said paragraphs were set forth in full herein.

23. The nature of the offenses charged, commerce involved, and relief sought present substantial questions of both law and facts common to the named plaintiff and to all of the members of the class. Because of the large number of citizens of the State of Hawaii who have purchased motor gasoline and other refined petroleum products from the named defendants and/or their retail dealers and other co-conspirators and because of the expense and burden to the parties and to the Court of litigating their claims separately, it is impracticable to bring them all before the Court. The named plaintiff, however, fairly insures the adequate representation of the interests of the entire class.

24. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize, and monopolization have resulted in the plaintiff, through its respective departments, institutions, agencies, etc., and in its citizens, paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein.

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the defendants (a) have combined in restraint of trade and

commerce hereinbefore described; (b) have combined to monopolize; (c) actually have monopolized the trade as hereinbefore described in violation of Sections 1 and 2 of the Sherman Act;

2. That plaintiff recover its damages, which, when ascertained, be trebled as required by Section 4 of the Clayton Act;

3. That plaintiff recover, as trustee or as representative of the above-pleaded class, the damages sustained by its citizens, which, when ascertained, be trebled as required by Section 4 of the Clayton Act;

4. That defendants and each of them be enjoined from continuing their unlawful conduct;

5. That plaintiff be awarded reasonable attorneys' fees as provided by Section 4 of the Clayton Act; and

6. That plaintiff recover the costs of litigation as provided by Section 4 of the Clayton Act.

Dated: February 27, 1969

STATE OF HAWAII
By Bert T. Kobayashi
Attorney General

Gilbert K. Hara
Patricia Kim Park
Joseph Kinoshita
Deputy Attorneys General

Joseph L. Alioto
Maxwell M. Blecher
Francis O. Scarpulla
By /s/ Maxwell M. Blecher

[Certificate of mailing omitted in printing]

[March 19, 1969]

[Title omitted in printing]

STIPULATION

It is hereby stipulated by and between the parties hereto:

1. that the motions heretofore addressed to Counts Two and Three of the Third Amended Complaint be deemed to be addressed to the Fourth Amended Complaint;

2. that defendants shall serve and file any further memoranda of points and authorities with respect to the Fourth Amended Complaint on or before April 18, 1969; and

3. plaintiff shall serve and file any responsive memorandum on or before May 12, 1969.

Pillsbury, Madison & Sutro
Francis R. Kirkham
Richard J. MacLaury
James F. Kirkham
Pratt, Moore, Bortz & Case
Daniel H. Case
Roy A. Vitousek, Jr.
By /s/ Richard J. MacLaury
Attorneys for Defendants Standard Oil Company of California and Chevron Asphalt Company.

Brobeck, Phleger & Harrison
Moses Lasky
Malcolm T. Dungan
By /s/ Malcolm T. Dungan
Attorneys for Union Oil Company of California

Howrey, Simon, Baker & Murchison
William Simon
Richard T. Colman
By /s/ Richard T. Colman
Attorneys for Shell Oil Company

Joseph L. Alioto
Maxwell M. Blecher
Francis O. Scarpulla
By /s/ Maxwell M. Blecher
Attorneys for Plaintiff

It is so *ORDERED* this 19th day of March, 1969.

/s/ Martin Pence
Judge of the United States District Court

[Certificate of service omitted in printing]

EXCERPTS FROM REPORTER'S TRANSCRIPT DATED MAY 29, 1969

(Rep.Tr. p. 74, lines 16-25):

[Mr. Blecher] Count II of the proposed complaint alleges a *parens patriae* claim. A *parens patriae* claim alters nothing in the context of the interest of the jurors or the Court. The *parens patriae* claim, if, as we respectfully submit it should be, it is sustained by this Court does no more than increase the prospective monetary recovery to the State. It adds no new parties. It changes no substantial issues.

So far as the class action is concerned, should the Court elect, either duplicatively, partially duplicatively or alternatively, the *parens patriae* sustains the class action. **[R.T. 74]**

(Rep.Tr. p. 85, line 22 through p. 86, line 12):

[Mr. Lasky] But let us turn exactly to the argument he makes in trying to support his *parens patriae* argument, and I can sum it up in about two seconds, it is, shall these wrongdoers, Shell, Union and Standard, who have wrongfully extracted from **[R.T. 85]** the pockets of the people, every citizen of this State, $14 million go unwhipped of justice and be permitted to keep that loot in their pockets? No, says he, your Honor shall create a new rule of law and take that loot which we have extracted from the people—from you and you and you in Hawaii—and put it in the treasury of this State where it will end redound to everybody's benefit.

The Court: That isn't *parens patriae* as I read it, though, Mr. Lasky.

Mr. Lasky: No, your Honor, and that's what we shall say when, as, and if we argue the *parens patriae* point, but it is what he claims is *parens patriae.* [R.T. 86] (Rep.Tr. p. 95, lines 4-17):

Mr. Simon: But most of them are not accurate. I give you one example, and this is a typical example. He said that we buy our gasoline from Standard. Now, this is not true. We do not buy any gasoline from Standard. It is true that some of the gasoline that Shell sells in the islands—not more than half—comes from the Standard refinery. But we don't buy it from them; we exchange it from them. And there's a big difference, your Honor, because, for every gallon of gasoline we give them, they give us here. We give them a gallon of gasoline in the California area, and that gasoline costs us what California gasoline costs us. So, it isn't a question of buying it from them here; it's a question of giving them in exchange a gallon of gasoline. There's a real difference. [R.T. 95] (Rep.Tr. p. 103, lines 9-18):

[The Court] We next come to the matter of *parens patriae—parens patriae* as pleaded, not as argued but as pleaded. This will come up perhaps later. As pleaded, it gives me no more interest in the outcome of the case than I would have if both Counts II and III were out. Count III must be couched under *parens patriae* on the basis of an economic injury to the entire State. It is not couched, as I read it, upon the individual losses of any user of gasoline. It is the economy of the State which must be injured; not the personal loss of any one individual. [R.T. 103]

(Rep.Tr. p. 104, lines 10-17):

In the event that Count III is allowed to remain, we might and may have a different problem. As to Count II, *parens patriae*, if that were to remain, there is no problem —no problem with any juror anymore than there would be any problem, as I've indicated to you, with the judge, because *parens patriae* is couched on the injury to the total economy of the State. It's not upon the individual economy or financial pocketbook or loss of any particular individual. **[R.T. 104]**

(Rep.Tr. p. 121, line 3 through p. 123, line 18):

[Mr. Kirkham] Now, I want to close with one thought that really the only argument that has been made by Mr. Blecher on this from beginning to end is the argument that Mr. Lasky, rather emotionally and much better than I could, summed up a moment ago, "Is this Court going to let these companies take a lot of money away from these poor people without giving them a remedy."

Well, the remedies that the Sherman Act has provided and the remedies that have been developed in the development of our law for 75 years have, I think, not been too ineffective. I don't want to be facetious but I've been an opponent of Mr. Blecher in enough cases to think that there certainly are remedies available.

I know of 15 or 20 suits pending, and I'm a little bit hesitant to say this and I don't want to but I will, against the oil industry throughout the United States and many of them are class actions. There are actions pending in the East that involve the public bodies of the States of Delaware, New Jersey and Pennsylvania. There are actions

pending on the West Coast—Mr. Blecher is connected with that—that are class actions.

There is no problem of remedy here. The class action provides a remedy if it's an appropriate class action. [R.T. 121]

Now, in this case, the plaintiff at the very beginning started out and said. I want every citizen who has purchased refined petroleum products in the State of Hawaii to be brought in here as a class. Now, he hasn't receded from that one inch, although our position has been, as stated by Mr. MacLaury at the outset, that we are objecting to that class. We are not saying that a proper class cannot be named in this suit and more particularly, perhaps, in another suit, and it would avoid the problem that Mr. Simon raises with respect to the status of the State as an individual of its own and not representative of any class.

But there is no question at all but what an appropriate class action can be brought. And what has happened here is, as I say, Mr. Blecher started out with that one class action; he hasn't receded from it. He started out with the *parens patriae* action to go as a parallel to it so the Attorney General will recover all this money, and he has completely ignored the fact that remedies are open under the law, adequate remedies under the law, that completely obliterate the imaginary horrible that he sees. He doesn't have to sue on behalf of every citizen of Hawaii that makes a completely impossible class. And if, some of the efforts that have gone in our battling these matters before your Court, your Honor had gone into taking a look at what the facts are and seen which ones

of these people belong to a class and which ones [R.T. 122] have like problems, then the law supplies a remedy, and you don't have to stretch and distort a unique and very special remedy like *parens patriae* in order to reach something that the law already gives him a chance to reach.

I believe I said earlier, I don't even think it presents a substantial question to ask this Court to make every citizen of Hawaii that has bought refined petroleum products a member of the class, and the many, many, many, many reasons for that have been set out in the arguments that have gone on before this. It's on an analogy of the Supreme Court of the United States refusing to take jurisdiction of a State Court when there isn't a substantial Federal question involved. It goes to the jurisdiction.

I don't think a substantial question is presented, but I urge, and strongly urge, and this Court, certainly with its vast antitrust experience, realizes instinctively that there are remedies that are available and a little bit of effort can get that remedy. [R.T. 123]

(Rep. Tr. p. 129, line 21 through p. 131, line 10):

The Court: I know what was the issue there but I'm taking the broad context of what was said to the Court. You tell me now how you would react to the argument, which undoubtedly would come, what were they referring to there but "the business of the State, the economy of the State, the [R.T. 129] property of the State, the intangibles."

Mr. Simon: Of course, the economy of the State is quite a different matter than the business of the State.

What was involved in Georgia was the claim that factories would not locate in Georgia because of the discriminatory freight rates which favored Northern locations.

The Court: So the State was thereby injured because it couldn't make the mine, the factories couldn't develop, they couldn't get their taxes, and so on. Am I wrong?

Mr. Simon: You don't collect taxes, of course, from nonexistent factories. On the other hand . . . .

The Court: Presupposing you were able to show the "but for"?

Mr. Simon: But for the economy of the State, your Honor, might have been affected; but the business of the State, the property of the State would not. The economy of the State is the standard of living of its people. The level of the economy, the gross income, or the gross national product, the gross State product, this is . . . .

The Court: And that's reflected how?

Mr. Simon: This is reflected by . . . .

The Court: By taxes.

Mr. Simon: That's one factor. The gross product of the State is another factor. The standard of living of the people is another factor. The average income of the people [R.T. 130] is another factor. But these aren't factors that are damage to the business or property of the State. They are factors which, in Georgia, the Supreme Court said the State could protect because there was no one else to protect them. The nonexistent factory couldn't claim damages because he hadn't built the factory, and what Georgia was seeking to do was to eliminate discriminatory rates that would bring new factories to the State. But there is nothing in that opinion and your Honor will recall that in the brief the Attorney General

of Georgia admitted that they couldn't collect money damages. [R.T. 131]

(Rep. Tr. p. 149, line 13 through p. 156, line 18):

The Court: Well, we have all had plenty of opportunity to decide whether *parens patriae* is a proper count in this case. I have studied the problem, aided and abetted by the very, very great educational argument presented both in writing and orally by all counsel here.

I take into consideration the words of Justice Holmes just quoted and hope what I have concluded indicates that I have an ability to read English intelligently.

Were it not for the words of Justice Douglas in that divided-Court decision in Georgia versus Pennsylvania Railroad, the problem would be simple, because, going down through the cases that have touched upon *parens patriae* and its use in the field of law, it only involved equitable relief. [R.T. 149]

It was only basically, in Georgia versus Pennsylvania Railroad and some of the words perhaps in North Dakota versus Minnesota, and, if you want to look at it backwards, perhaps Oklahoma versus American Book, you'll find any inferences that *parens patriae* would be a proper count in a Sherman 1 action for damages, I mean, injury to business or property.

The amended bill of complaint in Georgia versus Pennsylvania asserted four counts of injury. The third and fourth, as you well know from having poured over this one yourself, sought treble damages for alleged discriminatory freight rates charged the State and its citizens. Now, in its supporting brief, as you correctly pointed out, Mr. Kirkham, page 8, the State of Georgia indicated it was not primarily interested in seeking damages for past

injuries to the State and its citizens, but is primarily interested in the future welfare of the State and its people.

It appeared to me, as I read this, these Delphic words of the Supreme Court, it appeared to me that the Court held that Georgia had properly asserted a cause of action for both injunctive and damage relief as *parens patriae* as well as proprietary—that's the way I read it—and permitted the bill of complaint involving the Court's jurisdiction to be filed.

These words, which all of you have had a chance to **[R.T. 150]** read and analyze, Mr. Blecher said they mean this and counsel urge they mean that. I'm the man looking at them from the middle and this is what the Court said. You've heard it and you've read it. I'm going to repeat it for my own benefit as well as yours.

"Georgia, suing for her own injuries, is a 'person' within the meaning of Section 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy [which] injured the economy of Georgia."

I'm jumping along, "when it came to other sanctions Congress * * * authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies," these are my own mental underscorings, "it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae,* have long been recognized. There is no apparent reason why

those suits should be excluded from the purview of the anti-trust acts."

Now, is it to be narrowed to say that purview of the injunctive provisions of the antitrust acts? Should that be insterted there, because all of the other cases covered only [R.T. 151] injunction, and naturally that was all that Georgia finally decided that it wanted here. Was that what the Court was saying?

And the Court continues on page 452:

"Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil *sanctions,*" that's my underscoring, "the civil sanctions," albeit plural rather than singular, but it's there, "of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail."

I don't think I need to go into Keogh versus Chicago and how that limited the recovery and so forth.

One might argue that the State of Oklahoma versus American Book Company in 144 F.2d 585 is not to the contrary. I will not go into that. I'm forced to write a decision in this case. It is never my desire and I always reluctantly undertake a "monumental decision." I remember my first monumental decision. The Supreme Court reversed me. They may do so in this.

Because of the hour and because this is a ruling which will demand a fuller implementation, I will simply rule at this time:

As I read Georgia versus Pennsylvania Railroad, I [R.T. 152] can conceive that there can be such a damage to the economy of a State apart from its strictly proprietary loss, but a damage to the economy which is

susceptible to proof and translatable into money, dollars, cash.

And, when I read, as you did, too, "the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land," which, of course, would be destructive, "or the deposit of sewage in the streams," which might, again, be destructive to the over-all economy of the State. "They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets."

I can conceive that it would be possible, under Bigelow, at least, to offer some basis of proof which could establish a damage translated in dollars to a State because of the alleged conspiracy to the entire economy of the State, I mean, the alleged conspiracy and effect to the entire economy of the State.

So, I will rule that the *parens patriae,* as pled, is not subject to dismissal because it pleads a good cause of action in the context of this case here. **[R.T. 153]**

Now, I'm going to . . . . As I say, I'll have to write this. Don't expect it tomorrow. Insofar as the class action, you don't need to argue, not because I rule this way because I was ready to rule there in San Francisco on the class action.

Judge Harris is an able Judge, conceivably much more able than I. When he wrote the Chicken Delight case, he said what he thought a judge could do. As I see the present pleadings and pleadings in the proprietary capacity, there are two factors. Either the State is plead-

ing in the proprietary capacity as a wholesale buyer, or buyer of wholesale, or is pleading as a buyer of retail.

Now, we know that when it buys at retail, say, over on the island of Molokai—somebody found it easier to go to a service station and spend the State's money to buy gasoline—now, if they say that because that took place that we are now ready to take on and give the Court the horrendous problem of every last one of the individuals throughout the State, or whoever were here during that period, who purchased gasoline at retail, and take on the burden of determining how much each and every one should ultimately be entitled to who finally came in under the class, I state that I see so many, many problems—those who have been here and gone; those who bought 5¢ or $50 or $39.70, whatever it might be over a period. Even if you were able to say that, well, everyone of them had a credit card, which is not true, we know, [R.T. 154] so all we'd have to do is grab the records of these various companies, and just take all the credit card listings, and so forth, gentlemen, even if it were that way, I would hold that, under the circumstances right now, the class action based upon the injury to every individual purchaser of gasoline in the State, to me at the present time, in the context of the pleadings, would be unmanageable.

I'm not prepared at this time to go ahead with the class action as counsel has pled it because I feel that it would be unmanageable under the present context of the case.

The motion to dismiss Count III is granted, without prejudice, however. If you can come up sometime later with something that the Court feels that the Court can manage, we'll reconsider it.

Now, it's 4:10. We'll take a five-minute recess and I think we can dispose of the other matter in not too long a time and get through this afternoon.

(The proceedings recessed at 4:12 P.M. and reconvened at 4:23 P.M., May 29, 1969.)

Mr. Kirkham: May it please the Court, in the argument of Mr. Laskey's, he recognized that he misspoke himself as to the ruling and did say that he thought it was an appropriate case for certification.

The Court: I had just informed my legal eagles here that, if the motion for certification were again urged, **[R.T. 155]** that I probably would feel it was in order.

Mr. Kirkham: Thank you, your Honor.

The Court: And since now this statement allows me to take up the one that I passed, inasmuch as we're going to have certification of one problem, you might as well have certification of two. I think they can both be disposed of at the same time. So, the motion for certification under 1292(b), the motion for change of venue, is granted; the motion for certification under the same section for a *parens patriae* count is likewise granted. Counsel will prepare the necessary orders and I'll sign the same.

Now, do you want certification of your class action?

Mr. Blecher: No, your Honor. I simply want to inquire so our records are right. I think 1292(b) requires that, within ten days from the entry of the order from which certification is taken, the matter will be taken up with the Court of Appeals and a petition can be presented to the Court of Appeals. Is that time running from the order today? **[R.T. 156]**

[July 1, 1969]

In the United States District Court
for the District of Hawaii

Civil No. 2826

State of Hawaii, Plaintiff,

vs.

Standard Oil Company of California,
Union Oil Company of California,
Shell Oil Company, and
Chevron Asphalt Company,
Defendants.

DECISION ON PLAINTIFF'S PARENS PATRIAE COUNT

The State of Hawaii brought this antitrust action against three oil companies and a subsidiary of one, alleging in Count I of its Fourth Amended Complaint, basically, that the defendants violated Sherman 1 and 2 by bid rigging, price fixing, market monopolization, and other acts in restraint of trade, and asks for damages based upon the illegal excess prices paid for defendants' products by the State in its proprietary capacity, as a buyer of petroleum products.

In Count II the State "brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian, and representative of its citizens, to recover damages for, and secure injunctive relief against, the

violations of the antitrust laws hereinbefore alleged."[1] Plaintiff continues to allege that the combination and conspiracy of the defendants in restraint of trade and to monopolize the sale, marketing and distribution of refined petroleum products has "injured and adversely affected the economy and prosperity of the State of Hawaii" by:

"(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;

"(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;

"(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

"(d) the full and complete utilization of the natural wealth of the State has been prevented;

"(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

"(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

"(g) the Hawaii economy has been held in a state of arrested development."[2]

Plaintiff then alleges it "has not yet ascertained the precise extent of said damage to itself and its citizens"; but asked leave to insert such sum when ascertained.[3]

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[1]Fourth Amended Complaint, Paragraph 19.

[2]Fourth Amended Complaint, Paragraph 20.

[3]Plaintiff's Count III pled a class action. Defendants' motion to dismiss this count was granted in an oral bench decision, after briefing and argument.

Defendants moved to dismiss Count II—maintaining (a) "there can never be a *parens patriae* suit for damages; such a suit lies only in equity, and only for preventive relief;" (b) "Count II does not in fact allege any injury to the general economy of the State of Hawaii, or to Hawaii in its sovereign or quasi-sovereign capacity, that would support a *parens patriae* injunction;" (c) a *parens patriae* suit for damages is not maintainable under Section 4 of the Clayton Act which permits damages only to business and property, arguing that damages to a state's business or property are by definition and nature not damages to its sovereignty or quasi-sovereignty; (d) if dollar damages to the economy of the State were measured by the harm done to the individual inhabitants, there would be created the risk of double recovery, inasmuch as each of the State's inhabitants, in theory at least, would be entitled to sue for any direct damage to his own business or property; and (e) a *parens patriae* suit for damages under the antitrust laws will not lie because an injury to the state's sovereignty is by its very nature too remote or speculative to be measurable in money damages.

The problem has been twice fully briefed and argued by all parties.[4]

The concept of a *parens patriae* count in an antitrust action of the nature of the present one, emanates from

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[4]In plaintiff's Third Amended Complaint, the allegations of Count II flirted with the theory of a *parens patriae* claim, and on defendants' motion to dismiss, it was briefed by both plaintiff and defendants as if it had been properly alleged. This court in a prior Memorandum Decision found that a *parens patriae* claim had not been pleaded and dismissed the count with leave to amend. Thus, all parties were given two shots at the same target.

Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945), where the Supreme Court granted the State of Georgia's motion to file an amended complaint which alleged and sought relief from an antitrust violation by twenty railroad companies. The amended complaint asserted four counts of injury, the Third and Fourth of which sought treble damages for the alleged discriminatory freight rates charged the State and its citizens.[5] The Supreme Court held that Georgia had properly asserted a cause of action for injunctive and *damage* relief as *parens patriae* as well as proprietor, and permitted the complaint involving the Court's original jurisdiction to be filed. The Court stated:

> "Georgia, suing for her own injuries, is a 'person' within the meaning of § 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. . . . *But Georgia is not confined to suits designed to protect only her proprietary interests.* The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy [which] . . . injured the economy of Georgia. . . . When it came to other *sanctions* Congress . . . authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil *remedies*, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. *There is no apparent reason why those suits should be excluded from the*

[5] In its supporting brief (page 8) the State of Georgia indicated that it was "not primarily interested in seeking damages for past injuries to the State and her citizens, . . . [but in] the future welfare of the State and her people."

purview of the anti-trust acts." 324 U.S. at 447. (Emphasis added.)

"Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil *sanctions* of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail." 324 U.S. at 452. (Emphasis added.)

After allowing the State of Georgia to file its complaint seeking both equitable and legal relief and stating that all civil antitrust sanctions are available to the State in both its proprietary and *parens patriae* capacities, the Court ruled that damages based on the allegedly excessive freight rates would not be permissible, solely because they had been approved by the ICC and were therefore "legal" rates.[6] This is the only case which either counsel or the court has uncovered which lends precedential support to the claim that a state may recover money damages, trebled, in an antitrust action under the aegis of a *parens patriae* claim.

There are many cases, however, which have passed upon the primary problem of whether a state has sufficient interest in a controversy to be entitled to sue as *parens patriae*. In the determination of the state's standing to sue, each case poses a question of law which can be determined only by an analysis of the particular facts concerned. Generally it has been the Supreme Court which has determined whether a state has properly stated

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[6]See *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156 (1922) and *Marnell v. United Parcel Service*, 260 F.Supp. 391, 406 (N.D. Cal. 1966).

a claim as *parens patriae*. This is because of the Court's original jurisdiction over controversies between states or between a state and citizens of another state. In passing upon the appropriateness of a *parens patriae* claim, the Supreme Court acted in its capacity as a finder of fact, thus performing a function usually undertaken by a lower tribunal. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907), the Supreme Court permitted the State of Georgia to sue to enjoin fumes from a copper plant across the state border from injuring land in five (5) Georgia counties, very little of which was owned by the State, stating:

> ". . . [W]e are satisfied by a *preponderance of evidence* that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case [parens patriae]. . . ." (Emphasis added.)

Based on its view of the facts, the Supreme Court has entertained suits *parens patriae* to (a) restrain diversion of water from an interstate stream, *Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907); (b) enjoin changes in drainage which increase the flow of water in an interstate stream, *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); (c) preclude restraints on the commercial flow of natural gas, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); and (d) restrain the discharge of sewage into the Mississippi River and New York Bay, *Missouri v. Illinois and Chicago District*, 180 U.S. 208 (1901) and *New York v. New Jersey*, 256 U.S. 296 (1921). See also *Pennsylvania v. West Virginia, supra* at 592, where the Supreme Court, after finding a sufficient basis for a suit *parens patriae*,

distinguished certain prior opinions on the ground that "*the facts on which they turned,* as the opinions show, were so widely different from those here that they are not in point." (Emphasis added.)

Conversely, the Supreme Court has rejected the propriety of suits *parens patriae* to (a) enforce claims of a bank's creditors and depositors, *Oklahoma v. Cook,* 304 U.S. 387 (1938); (b) collect claims against another state, which claims, prior to assignment, belonged to citizens of the prosecuting state, *New Hampshire v. Louisiana,* 108 U.S. 76 (1883); (c) recover for injury allegedly resulting from unlawful freight rates charged its citizen-shippers, *Oklahoma v. A.T. & Santa Fe RR.,* 220 U.S. 277 (1911); and (d) enjoin alleged interference with interstate commerce resulting from state quarantine regulations, *Louisiana v. Texas,* 176 U.S. 1 (1900).

An analysis of the above cases indicates that if a state is to maintain an action in its *parens patriae* capacity, *initially* the facts must show that the state has an interest "independent of and behind the titles of its citizens," *Georgia v. Tennessee Copper Co., supra;* "has an interest apart from that of the individuals affected," *Pennsylvania v. West Virginia, supra;* "must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest," *Oklahoma v. Cook, supra;* "[it] must appear that the controversy to be determined is . . . not a controversy in the vindication of grievances of particular individuals," *Louisiana v. Texas, supra.* Thus the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-

claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The two *theories for recovery* of damages are separate and distinct. (At this stage, we do not concern ourselves with the nature of proof.) So, here, the State in the guise of *parens patriae* cannot recover for the individual and several possible damage claims of its many citizen-consumers of petroleum products. As the preceding cases unmistakably set forth, and as the dissent in *Georgia v. Pennsylvania R. Co., supra,* points out:

> "The inhabitants of the State who have suffered injury or who are threatened with injury by the unlawful practices alleged . . . are alone entitled to seek a legal remedy for their injury, and are the proper parties plaintiff in any suit to enforce their rights which are alleged to have been infringed. It has long been settled by the decisions of this Court that a State is without standing to maintain suit for injuries sustained by its citizens and inhabitants for which they may sue in their own behalf." 324 U.S. at 473.

The cases also make manifest a *second prerequisite* which must be met before a state may sue in *parens patriae,* viz., the state has standing to sue in that capacity only if a substantial portion of the inhabitants of the state are adversely affected by the challenged acts of the defendants. For example:

> ". . . [T]he interests of the single industry here involved must be held to be private interests, not interests *affecting the whole economy* or *all the people of the state.* This type of interest is insufficient to give Minnesota the right to sue as parens patriae on behalf of all, or a *substantial number,* of

her citizens." *Land O'Lakes Creameries v. Louisiana*, 160 F.Supp. 387, 389. (Emphasis added.)[7]

"... [T]he mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae*, trustee, *guardian* or representative of *all or a considerable portion of its citizens* ...." *Kansas v. Colorado, supra*, at 99. (Emphasis added.)[8]

Thus, if a "substantial number", "or a considerable portion of [Hawaii] citizens" are adversely affected by the alleged acts of the defendants, Hawaii would have the requisite standing to sue as *parens patriae* on behalf of the totality of those citizens. While a state may not sue, *parens patriae*, for the recovery of possible individual damages or claims of its inhabitants, nevertheless if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity.

As was conceded by counsel and as this court would judicially notice, there are almost 300,000 motor vehicles operating in this state with approximately 800,000 inhabitants. If more facts were needed, in this State where the grass never ceases to grow, gasoline-powered lawn mowers are as thick as the proverbial fleas on a dog. These two categories, of course, do not cover all of the engines in Hawaii that are powered by petroleum prod-

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[7]See also *Jones, Governor ex rel. Louisiana v. Bowles*, 322 U.S. 707 (1944).

[8]See also *Kansas v. Colorado*, 185 U.S. 125, 142 (1902) and *Missouri v. Illinois & Chicago District, supra*, at 241.

ucts. The court would judicially notice that there is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other petroleum products referred to in the present complaint, and perforce therefore, the cost thereof.

Hawaii meets each of the two primary requirements for a valid *parens patriae* cause of action and may maintain this suit as *parens patriae*, acting on behalf of her citizens.[9]

There is no merit in defendants' claim that there can never be a *parens patriae* suit for damages; that such a suit lies only in equity and only for preventive relief. *Georgia v. Pennsylvania R. Co., supra, unequivocally* determines that Georgia was [and ergo Hawaii is] "a 'person' entitled to enforce the civil sanctions of the antitrust laws." (324 U.S. at 452) The civil sanctions of the antitrust laws certainly include recovery of damages from violators thereof. As indicated earlier, the Court in denying Georgia the right to recover damages from the railroad, did so only because of the prior ruling of the Court in *Keogh v. Chicago N.W.R. Co., supra,* note 6. *Keogh* was also a suit for damages under Section 7 of the Sherman Act, 26 Stat. 210, wherein the Court determined that even though a rate-making conspiracy may have existed between the defendant railroads, nevertheless, for the purpose of a suit for damages, a rate, fixed by the Commission, until suspended or set aside, was for all

[9] *Georgia v. Tennessee Copper Co., supra; Missouri v. Illinois, supra; Pennsylvania v. West Virginia, supra.*

purposes the legal rate as between shipper and carrier, and denied Keogh's antitrust action. Absent the impact of the *Keogh* decision, the only rational inference to be drawn from *Georgia v. Pennsylvania R. Co.*, is that an antitrust suit for treble damages was properly pled by Georgia in its *parens patriae* capacity. Certainly the broad objectives of the antitrust statutes are not to be meanly or narrowly curtailed because it is a state that brings a damage claim thereunder, in a *parens patriae* capacity.

Although defendants urge that Count II "does not in fact allege any injury to the general economy of the State of Hawaii", this conclusatory argument is nullified by subparagraphs (c), (d), (e), (f) and (g) of paragraph 20 of plaintiff's complaint.[10] (See page 2, supra.)

Defendants additionally argue that any possible recovery by the State under a *parens patriae* theory must be apart from any recovery for an injury to the business or property of the State in its proprietary capacity. Defendants continue that the antitrust statutes allow damages to be recovered only for injury to "business or property." 15 U.S.C. § 15. Their position is that an injury to the economy of the State cannot be an injury to the State's "business or property."[11]

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[10]Allegation (a) is most ambiguous, and allegation (b) becomes intelligible only if the word "affect" is construed to mean "offset". See plaintiff's Count II, *supra*.

[11]Defendants cite *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 732 (8 Cir. 1964), as authority for the statement that the damage or injuries must be something different from that sustained by the community or general public. The words are convenient for defendants' argument, but the facts of that case have no application to the *parens patriae* problem before the court.

Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906), long ago said that a public body is injured in its "property" when it is forced to pay more for a commodity than it would absent a conspiracy. If the economy of a state can be injured, then that economy is finite and can fall within a definition of the word "property", even though it does not fall within the normal, simple definition of "business and property" under Section 4 of the Clayton Act. As indicated above, *Georgia v. Pennsylvania R. Co.* lays at rest defendants' semantic argument. It clearly there differentiated between suits for damages in the State's proprietary capacity and suits for damages in its quasi-sovereign capacity and held that damages to the State's economy, if proved, were recoverable as a distinct injury, severable from whatever injury it might suffer in its proprietary capacity.[12]

There can be no risk of double recovery from the plaintiff for any single damage. As previously stated, a *parens patriae* action cannot be brought to recover the individual damages of the State's inhabitants. If the State cannot prove injury to the State's economy—an injury completely severable from the injuries to its individual inhabitants, then of course it could recover no money damages. On this point, as well as in defendants' claim that an injury to the State's economy is of a nature too remote or speculative to be measurable in money damages (and cannot in any event be damages to a "state's busi-

[12] "But Georgia is not confined to suits designed to protect only her proprietary interests," and continued, ". . . we find no indication that, when Congress fashioned those civil [antitrust] *remedies*, it restricted the States to suits to protect their proprietary interests." 324 U.S. at 447. (Emphasis added.)

ness and property''), defendants move out of the area of pleading into the area of proof at trial. This case is at the pleading stage. Hawaii has pled a *parens patriae* cause of action that cannot be summarily dismissed. How it will prove its damage, what type of evidence will be offered, how the quantum of alleged damage is to be measured, are problems to be met *in futuro*, problems that will be dealt with at the proper time in the light of *Southern Photo Materials, Storey Parchment Co., Bigelow* and *Continental Ore.*[18]

Defendants' motion to dismiss Count II is DENIED.

Dated: Honolulu, Hawaii, this 1st day of July, 1969.

/s/ Martin Pence
United States District Judge

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[18] *Eastman Kodak v. Southern Photo Materials*, 273 U.S. 359 (1927); *Storey Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow. v. RKO Pictures, Inc.*, 327 U.S. 251 (1946); *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

[July 2, 1969]

In the United States District Court
for the District of Hawaii

Civil No. 2826

State of Hawaii, Plaintiff,

vs.

Standard Oil Company of California, et al., Defendants.

ORDER AND CERTIFICATION FOR INTERLOCUTORY APPEAL UNDER SECTION 1292(b) OF TITLE 28 OF THE UNITED STATES CODE

The following motions of defendants came regularly on for hearing before this Court on May 29, 1969: (1) Motion of Shell Oil Company and Union Oil Company of California for a change of venue; (2) Motion to strike paragraph 16(f) of the Fourth Amended Complaint; (3) Motion to dismiss Count II of the Fourth Amended Complaint; and (4) Motion to dismiss Count III of the Fourth Amended Complaint. The issues having been briefed and argued and having been considered by the Court,

It is hereby *ORDERED:*

1. The motion of defendants Shell Oil Company and Union Oil Company of California for a change of venue is denied.

2. The motion to strike paragraph 16(f) of the Fourth Amended Complaint is granted with leave to amend.

3. Defendants' motion to dismiss Count II of the Fourth Amended Complaint is denied.

4. Defendants' motion to dismiss Count III of the Fourth Amended Complaint is granted, without prejudice.

This Court finds that its order denying defendants' motion to dismiss Count II of the complaint herein involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of this litigation. This Court, therefore, certifies its order denying defendants' motion to dismiss Count II of the complaint for interlocutory appeal under section 1292(b) of title 28 of the United States Code.

It is so *ORDERED* this 2nd day of July, 1969.

/s/ Martin Pence

Judge of the United States District Court

[Certificate of Service omitted in printing]

In the United States District Court for the District of Hawaii

Civil No. 2826

State of Hawaii,
Plaintiff,

vs.

Standard Oil Company of California, Union Oil Company of California, Shell Oil Company, and Chevron Asphalt Company,
Defendants.

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss

I, Walter A.Y.H. Chinn, Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to 79 consists of a statement of the names and addresses of the attorneys of record, a certified copy of docket entries, transcripts of proceedings, and various original pleadings as hereinbelow listed and indicated:

	Pages
Complaint and Summons	2 - 11
Third Amended Complaint	12 - 21
Notice of Motion and Motion of Defendants Standard Oil Company of California and Chevron Asphalt Company for an Order Dismissing Counts Two and Three of the Third Amended Complaint	22 - 24
Motion of Shell Oil Company to Strike Certain Allegations of Count One and to Dismiss Count Two and Count Three of the Third Amended Complaint	25 - 34
Motion of Defendant Union Oil Company of California to Dismiss or Strike Count One and to Dismiss Counts Two and Three of the Third Amended Complaint, and in the Alternative to Strike	35 - 37
Memorandum Decision on Defendants' Motions to Dismiss or Alternatively to Strike Certain Allegations of Count One and to Dismiss Count Two and Count Three of the Third Amended Complaint	38 - 44
Fourth Amended Complaint	45 - 54
Decision on Plaintiff's Parens Patriae Count	55 - 66
Order and Certification for Interlocutory Appeal Under Section 1292(b) of Title 28 of the United States Code	67 - 69
Stipulation Pursuant to Rule 11(f) of the Federal Rules of Appellate Procedure	70 - 72
Docket Entries, certified copy of	73 - 79
Transcripts of Proceedings (May 23, 1968 July 30, 1968 December 13, 1968 May 29, 1969)	enclosed

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court this 4th day of September, 1969.

/s/ Walter A.Y.H. Chinn
Walter A.Y.H. Chinn, Clerk
United States District Court
District of Hawaii
By I. P. Akana
Chief Deputy

In the United States Court of Appeals
for the Ninth Circuit

No. 24,603

State of Hawaii,
Plaintiff-Appellee,
vs,
Standard Oil Company of California,
Union Oil Company of California,
Shell Oil Company, and
Chevron Asphalt Company,
Defendants-Appellants.

[September 25, 1970]

On Appeal from the United States District Court
for the District of Hawaii

Before: Merrill, Wright and Trask, Circuit Judges

Merrill, Circuit Judge

This appeal presents the question whether a state can, under §4 of the Clayton Act, 15 U.S.C. §15,[1] maintain a suit for treble damages as *parens patriae* for injury done to the general economy of the state. We hold it cannot.

[1] "§15. *Suits by persons injured; amount of recovery*
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The amended complaint filed by the State of Hawaii alleges that appellants conspired to fix and maintain unreasonably high prices for motor gasoline and asphalt in Hawaii. Count I alleges losses suffered by the state in its proprietary capacity. Count II, with which we are concerned, alleges:

> "The State of Hawaii * * * brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged."

The complaint then continues:

> "The unlawful contracts * * * have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:
>
> * * * * *"

Then are listed the seven specifications of injury set forth in the margin.[2]

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[2] "(a) revenues of its citizens have been wrongfully extracted from [the economy of] the State of Hawaii;

(b) taxes affecting the citizens and commercial entities have been increased to [offset] such losses of revenues and income;

(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

(d) the full and complete utilization of the natural wealth of the State has been prevented;

(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

(g) The Hawaii economy has been held in a state of arrested development."

(The bracketed language is included in response to Hawaii's assertion that it serves to correct typographical error in the complaint as filed.)

The prayer is for injunction and for treble damages under §4 of the Clayton Act. Respecting damages under Count II, the complaint alleges:

> "Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when such amount has been ascertained, plaintiff will ask leave of court to insert said sum herein."

Appellants moved to dismiss Count II on the ground that it failed to state a claim. The motion was denied.[3] The opinion of the court in support of its order appears at 301 F.Supp. 982 (D.C. Hawaii 1969). This appeal is taken from the court's order pursuant to 28 U.S.C. §1292(b).

Appellants attack Count II on many grounds. They contend that *parens patriae* suits will not lie to recover money damages. They contend that injury to the general economy of a state is not susceptible of computation or of proof, and that allegations of such injury should not be recognized as presenting a justiciable case or controversy. The basis of our disposition of the case makes it unnecessary to reach these issues. We hold only that damages for injury done to the general economy of a state are not recoverable by the state under §4 of the Clayton Act.

Hawaii relies (as did the District Court) on *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). Georgia, invoking the original jurisdiction of the Supreme Court

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[3]The complaint, in a third count, attempted to state a class action claim under Rule 23, Fed.R.Civ.P., on behalf of the state and all citizens who have purchased products from appellants. This count was dismissed by the court and no appeal has been taken from that order.

(Art. III, §2 of the Constitution), there sought leave to file a complaint against twenty railroad companies charging a conspiracy to fix arbitrary and noncompetitive freight rates to and from Georgia so as to prefer the ports of other states over those of Georgia. The nature of the injury allegedly suffered by Georgia is similar to that here alleged by Hawaii (see footnote 2).

Leave was granted. The Court stated:

> "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected." 324 U.S. at 451.

And:

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. * * * Suits by a State, *parens patriae,* have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts." 324 U.S. at 447.

As the Court made clear, however, it was concerned with the relief offered by §16 of the Clayton Act.

> "Sec. 16 of the Clayton Act provides for relief by injunction 'when and under the same conditions and principles as injunctive relief against the threatened conduct that will cause loss or damage is granted by

courts of equity.' Those requirements are sufficiently satisfied to justify a filing of this bill. It must be remembered that this is a suit to dissolve an illegal combination or to confine it to the legitimate area of collaboration." 324 U.S. at 460.

And:

"Dissolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here." 324 U.S. at 462.[4]

Section 16, 15 U.S.C. §26,[5] is far broader than §4. Any person may secure injunctive relief against threatened loss or damage by violation of the antitrust laws. Section 4 provides for recovery of treble damages only by a person injured in his business or property by such a violation.

Hawaii's claim does not constitute an effort to prevent unjust enrichment by the wrongdoers through recovery by the state, for the affected consumers or for itself, of the total of direct injuries suffered by persons who are unable to seek recovery for themselves.[6] Hawaii's

[4]Thus the Court in *Georgia* did not specifically rule on the question whether damages are recoverable in *parens patriae* suits. As we have noted, we do not reach that question here.

[5]Section 16 provides in part:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings * * *."

[6]As noted (footnote 3, *supra*), Hawaii's class action was dismissed and is not before us.

claim is over and above all such recovery by persons, or on behalf of classes, and is asserted to have independent existence quite apart from such direct injuries. In light of Hawaii's inability yet to articulate a more precise theory or measure of such damages, we are skeptical of the existence of an independent harm to the general economy. The general economy is an abstraction. It has no value in itself, save as it may (in a representational capacity on behalf of business and property generally) serve to confer value on the specific items of business or property it affects. It exists only as a reflection of the business or property values it represents.

Nevertheless, assuming *arguendo* that the general economy can suffer injury from antitrust violations independent of the injuries suffered by private persons or by the state in its proprietary role, we hold upon two closely related grounds that Hawaii's claim for money damages does not fall within §4.

1. An injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary capacity, engage in business. For injury suffered in these respects a state can recover under §4. *Georgia v. Evans*, 316 U.S. 159 (1942). Such was the basis for Hawaii's Count I. But the terms "business or property" are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community. *E.g., Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); *Duff v. Kansas City Star Co.*, 299 F.2d 320 (8th Cir. 1962); *Roseland v. Pfister Mfg. Co.*, 125 F.2d 417 (7th

Cir. 1942). Unless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly.

2. Accepting that the general economy can suffer injury from antitrust violations, such injury is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection. It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955). Accordingly, it has been held that shareholders, *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958); lessors, *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); creditors, *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910); patent owners suing for loss of royalties, *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955); and others of like remoteness lack standing to obtain damages under the antitrust laws.

The attenuated injuries alleged by Hawaii fall far outside the area of directness contemplated by the Clayton Act. Compensation of the public (let alone treble damages) for injury of such an extraordinary character presents policy questions which, in our view, should be subjected to close Congressional inquiry and study. We do not believe that §4 as it now stands can be construed to make such recovery available.

Reversed and remanded with instructions that Count II of Hawaii's amended complaint be dismissed.

United States Court of Appeals
for the Ninth Circuit

No. 24,603

State of Hawaii,
Plaintiff-Appellee,
vs.
Standard Oil Company of California, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Hawaii

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded with instructions that Count II of Hawaii's amended complaint be dismissed.

Filed and entered September 25, 1970.

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

E. Robert Seaver
Clerk of the Court

March 2, 1971

Peter J. Donnici, Esq.
111 Sutter Street
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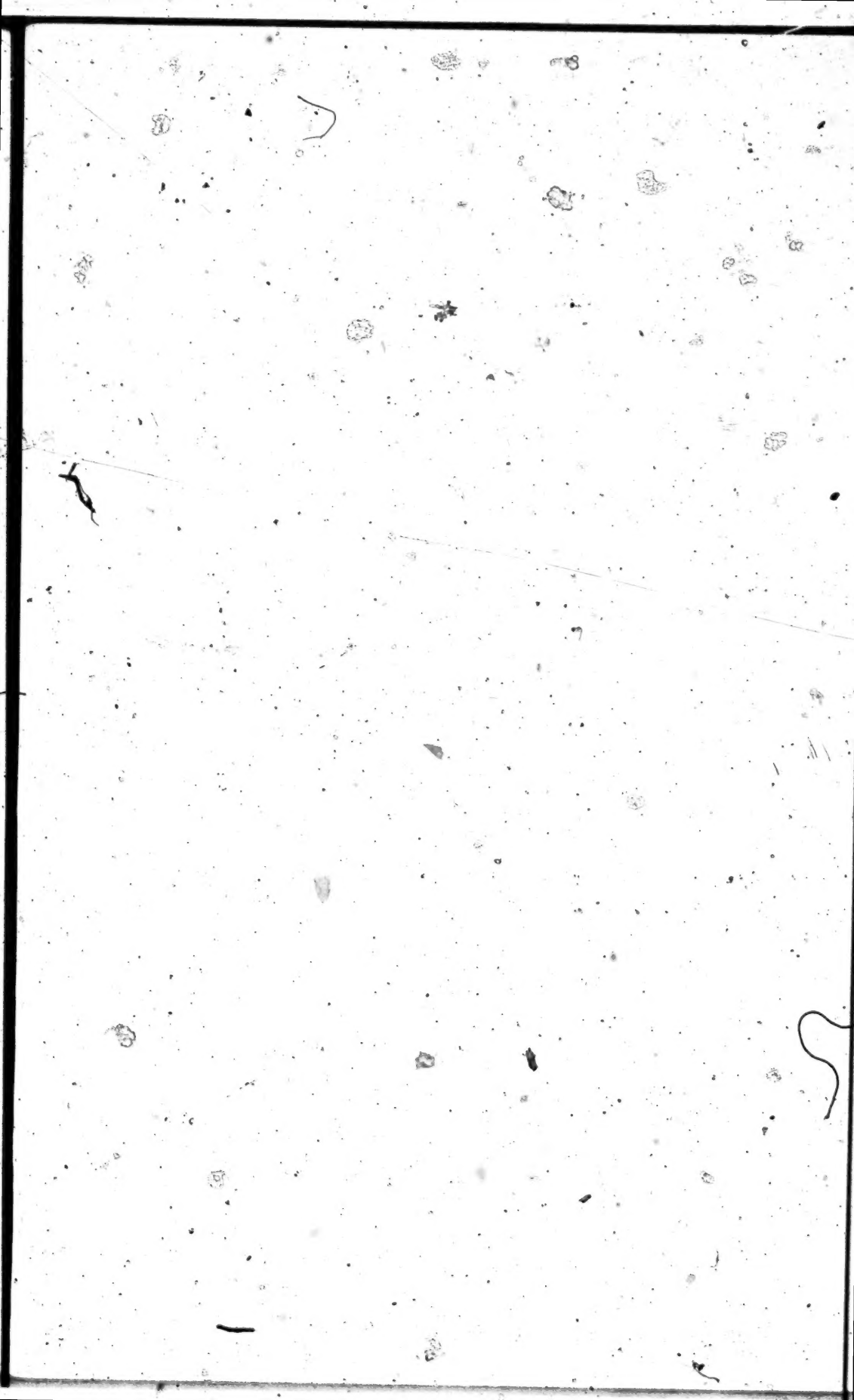
Re: Hawaii v. Standard Oil Company
of California, No. 1060, O.T. 1970

"The petition for a writ of certiorari is granted. Mr. Justice Harlan took no part in the consideration or decision of this petition."



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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

70-49

No. ~~1060~~

STATE OF HAWAII, *Petitioner*

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
UNION OIL COMPANY OF CALIFORNIA,
SHELL OIL COMPANY and CHEVRON
ASPHALT COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No.

STATE OF HAWAII,
Petitioner,
vs.
STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner State of Hawaii prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case (Court of Appeals No. 24,603) on September 25, 1970.

OPINIONS OF THE COURT BELOW

This is a civil action for injunctive relief and damages initiated by petitioner, the State of Hawaii against respondents Standard Oil Company of California, Union Oil Company of California, Shell Oil Company and Chevron Asphalt Company. The action was filed in the United States District Court for the District of Hawaii which possessed jurisdiction under 28 U.S.C. §1337 and 15 U.S.C. §§15, 26. In the District Court, plaintiff-petitioner sought injunctive relief and damages as against respondents who were alleged to have combined and conspired to fix the prices of motor gasoline, other refined petroleum products and asphalt. The State of Hawaii sought relief for injuries it suffered in its proprietary capacity (Count One), and as *parens patriae* for injuries to the State and its economy (Count Two), and also through a class action as trustee or representative of its consumers who suffered individual injury (Count Three).

Upon respondents' motion to dismiss Counts Two and Three of the complaint, the District Court sustained the right of the State to maintain its action for damages and injunctive relief as *parens patriae,* but dismissed Count Three, the class action. That decision is reported as follows: *State of Hawaii v. Standard Oil Company of California, et al.,* 301 F.Supp. 982 (D. Hawaii 1969). That decision and opinion is set forth in Appendix I to this petition, *infra.*

Respondents, pursuant to 28 U.S.C. §1292(b) appealed from the order denying their motion to dismiss Count Two. On September 25, 1970, the United States Court of Appeals for the Ninth Circuit reversed the ruling of the

District Court and remanded the case ". . . with instructions that Count Two of Hawaii's amended complaint be dismissed." *State of Hawaii v. Standard Oil of California, et al.*, ... F.2d ..... (9th Cir. September 25, 1970). That opinion is, as yet, unreported; a copy of the decision and opinion is set forth in Appendix II to this petition, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 25, 1970 (See Appendix II). No rehearing or extension of time was either sought or granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The overriding issue here involved relates to the right of the State of Hawaii to utilize the remedies provided by the federal antitrust laws in maintaining an action as *parens patriae* for injuries to the State and its economy as a result of a widespread, pervasive price-fixing conspiracy perpetrated by various major oil companies and directed against the captive market of the State of Hawaii, its economy and its consumer citizens. At stake is the continuing viability of this Court's decision in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), as a basis for the effective enforcement of the antitrust policy of the United States through civil actions initiated by the states under circumstances in which

actions by private consumers are not realistically feasible or practical.

Specifically the questions presented for review by this Court are:

I. Whether a state, as *parens patriae,* may enforce the civil sanctions of the antitrust laws and maintain an action for damages and injunctive relief against major oil companies which have combined and conspired to fix inflated prices *in that state* injuring the economy and general welfare of the state and adversely affecting a substantial portion of the citizenry who are without an otherwise effective remedy?

II. Whether the Court of Appeals erred in ruling that the State of Hawaii, as *parens patriae,* does not have standing to maintain an action under Section 4 of the Clayton Act (15 U.S.C. §15)?

III. Whether the Court of Appeals erred in its failure to recognize that, under *Georgia v. Pennsylvania Railroad Co., supra,* a comprehensive and pervasive price-fixing conspiracy such as alleged herein directed against the markets and consumers within the State of Hawaii could cause substantial injury to the economy and well-being of the State itself and that such injuries are not so indirect as to preclude petitioner's standing to maintain the present action?

IV. Whether, in light of numerous cases such as *Bigelow v. R.K.O. Radio Pictures, Inc.,* 327 U.S. 251 (1946), the Court of Appeals erred in its remand for summary dismissal of the *parens patriae* claim which thereby precluded plaintiff from presenting relevant eco-

nomic data from which the jury could have reasonably estimated the extent of the economic injury and damages suffered as a result of the respondents' illegal and profitable price-fixing scheme?

V. Whether in its remand of the cause for summary dismissal, the Court of Appeals erred in failing to permit petitioner, in its effort to enforce the policies of the antitrust laws and prevent the unjust enrichment by the respondent-wrongdoers, to maintain the present action as *parens patriae* for recovery of damages suffered by citizens and residents of the State who are unable to seek recovery for themselves especially in a case such as this one where the alleged wrong has also injured the economy and well-being of the State?

STATUTES INVOLVED

1. The Clayton Act, Section 4 (15 U.S.C. §15) provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. The Sherman Act, Section 1 (15 U.S.C. §1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

3. The Sherman Act, Section 2 (15 U.S.C. §2) provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT

This is a civil antitrust action for treble damages and injunctive relief initiated by the petitioner, State of Hawaii against the respondents, Standard Oil Company of California (hereinafter "Standard"), Union Oil Company of California (hereinafter "Union"), Shell Oil Company (hereinafter "Shell") and Chevron Asphalt Company (hereinafter "Chevron"), pursuant to sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26). Count One of the fourth amended complaint, alleges that the respondents combined and conspired to fix and maintain unreasonably high prices for motor gasoline, asphalt and other refined petroleum products and, further, that they monopolized trade and commerce in such products in violation of the Sherman Act, Sections 1 and 2, 15 U.S.C. §§1, 2 (R. 46-50). In this respect, the State alleges that—as a purchaser of gasoline, asphalt and such other products through its departments, institutions and agencies—it was compelled to pay higher prices for these products than it would have paid in a free and competitive market. Petitioner alleges

that appellants' unlawful combination thus resulted in economic injury to the State in its proprietary capacity. (R. 50).

Count Two of the amended complaint re-alleges the conspiracy by and between Standard, Union, Shell and Chevron and additionally alleges (R. 50-51):

> "19. The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws, hereinbefore alleged.
>
> 20. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization, hereinbefore alleged, have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:
>
> (a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;[1]
>
> (b) taxes affecting the citizens and commercial entities have been increased to affect[2] such losses of revenues and income;
>
> (c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
>
> (d) the full and complete utilization of the natural wealth of the State has been prevented;

---

[1]This should be read as follows: "revenues of its citizens have been wrongfully extracted from the *economy* of the State of Hawaii."

[2]This is a typographical error. The word "affect" should be "offset".

(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

(g) the Hawaii economy has been held in a state of arrested development.

21. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

In Count Two, then, the State of Hawaii asserts a claim as *parens patriae* to protect the economy of the State and the general welfare of its citizenry. In Count Two the State seeks damages pursuant to Section 4 of the Clayton Act (15 U.S.C. §15), in order to recover for the economic harm which the respondents have already caused by their alleged price-fixing conspiracy. Moreover, injunctive relief is sought to prevent the continuation of the alleged economically deleterious price fixing conspiracy in the future. (R. 52-53.)

In a third count of the amended complaint, the State of Hawaii re-alleged the conspiracy and sought recovery pursuant to Rule 23 (Fed. R. Civ. Proc.) as representative of a class comprised of all purchasers (in the State) of respondents' gasoline, asphalt and/or other refined petroleum products (R. 51-53).

Respondents moved to dismiss Counts Two and Three. They argued that an action by the State as *parens patriae*

would not lie to recover damages under the antitrust laws for an injury to its economy (R. 56-57). Moreover, as to Count Three, respondents challenged the class action as unmanageable. They argued that because the class involved (consumers of petroleum products) would be so large and diverse the Court should not allow the utilization of the class action remedy (R. 38, 39).

The District Court apparently agreed with respondents as to the impropriety of a class action and granted the motion to dismiss Count Three of the amended complaint. (R. 68).

However, the District Court denied respondents' motion to dismiss Count Two of the complaint, recognizing that (R. 62)

> "... if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity."

The District Court's decision upholding Count Two was based on an historical and analytical application of the *parens patriae* doctrine. The Court recognized that the *parens patriae* remedy is available to the State where (a) a "substantial portion of the inhabitants are adversely affected" by the allegedly wrongful acts challenged in the action (R. 61); and (b) the deleterious impact upon the general welfare of the State and its economy are separate from the economic injuries suffered by individual citizens (R. 62, 64).

Thus, the District Court sustained the State of Hawaii's *parens patriae* claim because the respondents' alleged conspiracy was so widespread as to injuriously affect

hundreds of thousands of citizens of Hawaii and thus raise a justiciable issue with respect to the alleged impact on the State's economy (R. 62). By dismissing the class action (Count Three), it may be reasonably inferred that the Court recognized that each of these citizens had no practical or effective individual remedy in their own right (which is the historical justification for the *parens patriae* remedy). Moreover, by focusing on the allegations made in paragraph 20 of the complaint (R. 51), the Court recognized that the State of Hawaii is here seeking to recover for an injury caused to *its economy* and not for the economic losses of the individual consumers. (R. 64, 65).

In light of these considerations and additional considerations such as the size and pervasiveness of the oil industry, the impact of its products upon our society, the nature of the price-fixing conspiracy alleged herein, and the effect of that conspiracy upon hundreds of thousands of small-volume consumers the District Court found that the *parens patriae* remedy was proper *in the present case*. Contrary to the fears expressed by respondents in the Court of Appeals, then, a decision sustaining Count Two herein may have some precedential relevance in a limited number of other industries, but it would not permit the *parens patriae* action to ". . . become a commonplace remedy for recovery of damages under the antitrust laws." (Opening Brief, p. 6.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS SERIOUSLY WEAKENS THE EFFECTIVENESS OF THE PRIVATE ACTION PURSUANT TO SECTION 4 OF THE CLAYTON ACT AS A VITAL MEANS FOR ENFORCING THE ANTITRUST POLICY OF THE UNITED STATES.

By its decision and opinion in the present case, the Court of Appeals for the Ninth Circuit has emasculated this Court's ruling in *Georgia v. Pennsylvania Railroad Co., supra*. But equally as significant, the Ninth Circuit's decision has further contributed to the erosion of the civil antitrust remedies provided by Congress as a significant component in the vigilant enforcement of national antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947). In its *Perma-Life Mufflers* ruling, this Court condemned judicially created restrictions which ". . . threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." 392 U.S. at p. 136.

It cannot be denied that there exists great confusion and significant inconsistencies among the Circuits (and often within a Circuit itself) concerning the standing of plaintiffs in civil antitrust actions initiated under Section 4 of the Clayton Act. Often the confusion is generated by the overly conceptual, rather than analytical, approach to defining the "area of the economy endangered" by the antitrust violation (or so-called "target area"). See, for example, *SCM Corp. v. Radio Corporation of America*, 276 F. Supp. 373 (S.D. N.Y. 1967) *aff'd* 407 F. 2d 166 (2nd Cir., 1969); *Fields Productions, Inc. v. United Artists*

Corp., ____ F. 2d ____ (2nd Cir., Sept. 8, 1970); Compare: *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955); *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F. 2d 190 (9th Cir. 1964) *cert. denied*, 379 U.S. 880 (1964).

Many courts have erroneously focused upon the question of whether the injuries to the plaintiff were "direct" or "indirect". *Conference of Studio Unions v. Loew's Inc.*, 193 F. 2d 51 (9th Cir. 1951), *cert. denied* 342 U.S. 919 (1952); Compare: *Hoopes v. Union Oil Co.*, 374 F. 2d 480 (9th Cir. 1967).

Most recently, courts have emasculated the civil antitrust remedy by restrictive interpretations of the type of economic and proprietary interests which are protected by Section 4. See *V.T.R. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773 (S.D. N.Y. 1969); Compare: *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D. N.Y. 1964); *Mulvey v. Samuel Goldwyn Productions*, ____ F. 2d ____ 9th Cir. Case No. 24157, decided October 20, 1970).

The decision of the Court of Appeals in our present case not only reflects the judicially created chaos surrounding the question of standing under Section 4, it proceeds to compound that confusion and further obfuscate standing considerations by restrictively construing the words "business" and "property" in such a way as to limit the availability of this civil antitrust remedy and thereby weaken the effectiveness of the treble-damage action as a means for enforcing national antitrust policy.

The State of Hawaii's petition for a writ of certiorari should be granted in the present case in order to provide

this Court with an opportunity to settle the confusion and inconsistencies which have proliferated in the lower federal courts. This Court, then, must forcefully re-articulate the position which it has consistently followed of liberalizing the availability of the civil treble-damage remedy. Note, *Standing To Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L. Rev. 570 (1964).

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) this Court stated, concerning Section 4:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors or to sellers. Nor, does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; *American Tobacco Co. v. United States*, 328 U.S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." [Citing *United States v. South-Eastern Underwriters Ass'n.*, 332 U.S. 533, 553 (1948).

In *Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957), the Court appeared to be specifically chastising those lower courts which had restrictively limited the standing of treble damage plaintiffs:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Publishing Co. v. United States*, 1953, 345 U.S. 594, 614, *and meet the requirement that petitioner has thereby suffered injury*. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the

> public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

Again in 1961, the Court stated, regarding a plaintiff's right to maintain an action under Section 4 of the Clayton Act:

> "[To] state a claim upon which relief can be granted under that section, allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all the law requires.
>
> *Radiant Burners v. People's Gas & Light Co.*, 364 U.S. 656, 660 (1961).

II. THE STATE OF HAWAII SHOULD BE PERMITTED TO MAINTAIN THIS CIVIL ANTITRUST ACTION FOR DAMAGES AND INJUNCTIVE RELIEF IN ITS CAPACITY AS PARENS PATRIAE.

A. The Necessity of the Parens Patriae Remedy in the Present Case.

Respondents, in their historical discussion of the *parens patriae* doctrine and the original jurisdiction cases in the Court below, mistakenly characterize the present action. The numerous cases cited by respondents, including *Oklahoma v. Cook*, 304 U.S. 387 (1937); *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Louisiana v. Texas*, 176 U.S. 1 (1900); *New Hampshire v. Louisiana; New York v. Louisiana*, 108 U.S. 76 (1883) and the more recent *Land O'Lakes Creameries v. Louisiana*, 160 F. Supp. 387 (E.D. La. 1958), all rule merely that a state may neither sue as

parens patriae nor initiate an original action in the Supreme Court if the state is attempting to enforce the rights of a small and well-defined group of private citizens. Petitioner can accept the logic of these cases. However, the allegations of the complaint herein demonstrate why ours is not such a case. The State of Hawaii does not here seek to vindicate the private claims of its citizen-consumers. The individual injuries to these citizens were sought to be remedied through Count Three of the amended complaint in a class action in their behalf. However, the District Court dismissed the class action, at the urging of respondents that the class would be so large and diverse as to make adjudication of the individual claims of each consumer impossible. (R. 68).

Thus, the hundreds of thousands of injured citizens who were consumers of respondents' refined petroleum products in Hawaii are unable to join in a class action. Individually their injuries are so small that realistically—and historically—it cannot be contemplated that their claims will ever be brought. Thus, if the decision of the Court of Appeals is allowed to stand, respondents will be permitted to retain the bulk of the revenue which they unlawfully extracted from the consuming public in the State of Hawaii.

Standard, Union, Shell and Chevron did (we must here assume) enter into a conspiracy to establish and impose artificially inflated prices for gasoline and other petroleum products in the Hawaii market and these respondents illegally derived substantial amounts of money as a result of their monopolistic conduct. Is their wrong to go unremedied? Will the wrongdoers be permitted to profit from their illegality?

Our legal system must not and does not tolerate such unjust enrichment. A widespread anti-competitive discriminatory price-fixing conspiracy which, in its pervasiveness, victimizes millions of citizen-consumers in a particular state may cause a significant injury to the economy of the state itself. Such injury, if found to exist, may be remedied through an action brought by the state in its capacity as *parens patriae. Georgia v. Pennsylvania Ry. Co., supra.*

The crucial problem which this Court must confront is that if the Court of Appeals decision stands, in a case such as ours, antitrust conspirators who fix prices on consumer products (if the impact of the anti-competitive practice is sufficiently pervasive) will be able to retain their illegal profits. Government fines are but a miniscule fraction of the conspirators' illicit gains, and class actions are impractical because of the size of the prospective class and the relatively small financial loss of each class member. Indeed, the decision of the Court of Appeals, if not reversed, would ironically encourage would-be antitrust violators to spread the anti-competitive effect of their illegal price-fixing over as large a portion of the consumer population as possible. The more comprehensive the illegal program, the better chance of avoiding any meaningful private treble-damage action.

This Court has recognized this dilemma in another context. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court rejected the application of the pass-on defense against shoe buyers, observing:

> "*These ultimate consumers,* in today's case the buyers of single pairs of shoes, *would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust trust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them.* Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. at 494. (Emphasis added.)

Our case presents a situation more critical and urgent than that in *Hanover Shoe.* For here, as in *Hanover Shoe,* the hundreds of thousands of injured consumers have no practical antitrust remedy, but in addition, there exists in our case no "middlemen" who can effectively prevent respondents from retaining "the fruits of their illegality."

The State of Hawaii has alleged that the subject matter of respondents' conspiracy concerns the prices charged for products in the Hawaiian market and that in Hawaii such prices are maintained at a discriminatorily high level as compared to prices for the same products in other United States' market areas. From the complaint petitioner's contention is clear: that pursuant to this anti-competitive conspiracy, the respondents have predatorily preyed upon the numerous petroleum product consumers in Hawaii and have thereby caused substantial injury to the economy of the State.

This Court, then, must follow the dictates of its decision in *Georgia v. Pennsylvania Ry. Co.,* 324 U.S. 439, 445 (1945) where it was stated:

> ". . . we construe the allegation . . . as a charge that defendants have conspired to fix rates so as to discriminate against Georgia."

In our case, as in the *Georgia* decision, respondents are alleged to be guilty of combining to fix prices *in Hawaii*. As such they have discriminated against Hawaii *as a state*. It is not necessary for the maintenance of this *parens patriae* claim to allege or prove that the respondents, in establishing discriminatorily high prices in Hawaii, acted with malice or ill-will against the State or its consumers. For regardless of their intention, the impact of the alleged price-fixing conspiracy is equally injurious to the Hawaii economy. As the complaint alleges, in part: revenues have been unjustifiably extracted from the State's economy; opportunities in manufacturing, shipping and commerce have been restricted and curtailed; the high cost of manufacturing in Hawaii has precluded its products from equal competitive access to the national market as compared with those of other states; and the Hawaii economy has been held in a state of arrested development (R. 51).

Contrary to respondents' argument in the Courts below, then, this case *does* involve a conspiracy to discriminate against the State of Hawaii and its citizens. And, as a consequence of that conspiracy, the State of Hawaii suffered an injury to its economy. Under *Georgia v. Pennsylvania R. Co., supra,* the antitrust claim asserted by the State of Hawaii as *parens patriae* is properly alleged.

B. Georgia v. Pennsylvania Ry. Co. Establishes the Right of the State of Hawaii, as Parens Patriae, to Maintain an Anti-trust Action as Alleged in Count Two of the Amended Complaint.

Respondents, in their briefs below, devoted extensive verbiage to an historical study of the *parens patriae* action and its original function of permitting a sovereign to bring an action on behalf of legally incompetent citizens. Petitioner submits that this historical analysis, while interesting, is essentially irrelevant to the current action. It is clear under modern law that the state has the right to bring suit as *parens patriae* on behalf of all, or even a substantial portion of its citizens, whether or not they are legally competent. *Georgia v. Pennsylvania Ry. Co., supra; Land O'Lakes Creameries v. Louisiana,* 160 F.Supp. 387, 389 (E.D. La. 1958).

Respondents then attempted to characterize this action as one in which the State of Hawaii is attempting to vindicate the essentially private claims of its citizen-consumers. For example, in the Courts below, respondents cited *Oklahoma v. Cook,* 304 U.S. 387 (1937). In that case, the Court merely ruled that the State may not avail itself of original jurisdiction in the Supreme Court when it is acting for a small group of private parties (depositors and creditors of a bank) rather than in the state's interest as a sovereign. The rule of the *Cook* case, then, was that original jurisdiction in the United States Supreme Court is improper in a case where the Court determined that the state's request for relief was "sought solely for the benefit of depositors and creditors of the bank." 304 U.S. at 395.

The same issue relating to the state's pressing of claims on behalf of a well-defined group of private individuals was also involved in other cases cited below by respondents. *New Hampshire v. Louisiana; New York v. Louisiana*, 108 U.S. 76 (1883); *Louisiana v. Texas*, 176 U.S. 1 (1900); *North Dakota v. Minnesota*, 263 U.S. 365 (1923). In most of these related cases the state was asserting essentially private claims of a particular (and often very small) segment of its population. The state had assumed the role of plaintiff in order to invoke the original jurisdiction of the Supreme Court and/or to circumvent the Eleventh Amendment which would have precluded federal jurisdiction in an action by the private citizens (who were the real parties in interest) against another state. Thus, the Court was concerned lest the constitutional limitations of Article III and the Eleventh Amendment would be circumvented by permitting the state to bring an action on behalf of a small well-defined group of private injured parties.

And in *Oklahoma v. A.T.& S.F. Ry.*, 220 U.S. 277 (1944) (also relied upon heavily by respondents below) the *parens patriae* issue was not even mentioned by this Court. That case involved primarily questions of the Court's original jurisdiction and the Eleventh Amendment neither of which are relevant here. Subsequently, the Supreme Court had occasion to characterize the *Oklahoma* case as "... a suit brought in the name of the state [but] in reality for the benefit of particular individuals" (324 U.S. at p. 446).

Of more relevance is another line of cases in which it was clear that the state, suing as *parens patriae* was pur-

suing its own interest or the *interest of a substantial portion of its citizens at large.* Thus, the propriety of the *parens patriae* suit was recognized and the state was accorded standing. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230; *South Dakota v. North Carolina*, 192 U.S. 286 (1904); *Georgia v. Pennsylvania Ry. Co., supra.* For clear guidance in determining the State of Hawaii's standing under Count Two in the present action, this Court must look to its most recent, most relevant, and most authoritative decision—*Georgia v. Pennsylvania Ry. Co., supra.*

The ruling of that case was that the state, as *parens patriae,* may maintain an action to remedy a violation of the antitrust laws, specifically with respect to violations of the Sherman Act. The Court recognized that a widespread, anti-competitive conspiracy in a major industry which results in imposition of an inflated and discriminatory pricing structure on the economy of the state constitutes a *serious public wrong.* The discriminatory pricing scheme alleged in the present case permits the respondents to inflate their prices for all refined petroleum products (which in today's society are "necessities") at the expense of the economy of Hawaii and its citizen-consumers. The Court in *Georgia v. Pennsylvania Ry. Co.*, said that when such discriminatory pricing policies are directed at the citizens and consumers of a particular state they:

> ". . . may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a state as profoundly as the diversion of waters from the rivers. They may stifle, impede,

> or cripple old industries and prevent the establishment of new ones. They may arrest the development of a state or put it at a decided disadvantage in competitive markets. . . . But discriminatory rates fastened on a region have . . . a more permanent and insidious quality. Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister states." 324 U.S. at 450-451.

Whatever implications the *Oklahoma* case and earlier decisions had regarding the *parens patriae* doctrine were completely superseded by *Georgia v. Pennsylvania Ry. Co., supra*. *Georgia* established, beyond question, that a state may maintain an action as *parens patriae* under the antitrust laws to remedy discriminatory rate or price-fixing conspiracies which are directed at that State's economy. Our present case is nearly identical to the situation in *Georgia*. As in *Georgia*, the case at bar *does* allege a conspiracy, the impact of which, discriminates against the State of Hawaii and its citizens and injures the State's economy and prosperity. When a group of private conspirators combine to inflate prices for a necessary service or commodity and direct their discrimination against a substantial number of the consumers in a state, the state suffers an injury and it may—in its own name—seek an appropriate remedy (324 U.S. at p. 447).

Much of the argument in the Courts below concerned the respondents' claim that a *parens patriae* action by the State could result in a double recovery against them. In support of this argument, respondents submitted a law

review article which it must be noted, was authored by two attorneys who are currently active in defending other *parens patriae* antitrust cases. Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 N.W. L.Rev. 193 (1970).

This argument fails to recognize that the *parens patriae* claim here asserted by the State of Hawaii seeks recovery which *it* has sustained in its quasi-sovereign capacity. Compare: *Hanover Shoe, Inc., v. United Shoe Machinery Corp., supra.* Moreover, respondents have ignored the fact that the *parens patriae* remedy by the State ". . . .is classically exercised 'for the prevention of injury to those who cannot protect themselves'," citing *Mormon Church v. United States*, 136 U.S. 1, 57 (1890). It has already been established here that the vast majority of citizen-consumers in Hawaii have no effective or feasible remedy on an individual basis to protect themselves from respondents' price fixing conspiracy. See Wade and Kamenshine, *Restitution for Defrauded Consumers*, 37 Geo. Wash. L. Rev. 1031, 1048-1049 (1969); Note, *Antitrust Remedies*, 23 Vanderbilt L. Rev. 405, 411 (1970).

In nearly every successful *parens patriae* action which has been initiated in the past, it would be possible to identify individual injuries to particular private citizens. Thus, the mere fact that Hawaiian consumers of respondents' petroleum products were individually injured by the price fixing conspiracy does not preclude the State of Hawaii from maintaining an independent action to remedy the *separate injury* to its economy.

In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), the states of Pennsylvania and Ohio were permitted, as

parens patriae, to enjoin West Virginia's interference with the flow of natural gas to the plaintiff states and their citizens. The United States Supreme Court ruled:

> "The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. *This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected.* It is not merely a remote or ethical interest but one which is immediate and recognized by law" (262 U.S. 592) (Emphasis added).

Many of the early *parens patriae* actions were allowed to remedy numerous varieties of nuisances which harmed private citizens in the plaintiff states, including cases involving the diversion of water, water pollution and air pollution. *Kansas v. Colorado*, 206 U.S. 46 (1906); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Georgia v. Tennessee Copper Co., supra.* In all of these cases, the Supreme Court recognized that the interests of the states were separate and apart from the related injury to their individual citizens. *Pennsylvania v. West Virginia, supra.* And in each case the utilization of the *parens patriae* remedy was permitted by the states because it was pursued to redress injuries which affected substantial portions of the citizenry. *South Dakota v. North Carolina, supra.*

Against the historical background of these cases in which the states were allowed to sue for injuries to themselves as well as to substantial portions of their inhabi-

tants, the result reached in *Georgia v. Pennsylvania Ry. Co., supra,* logically and properly followed. In that case, it was alleged that certain railroad carriers had combined and conspired to fix freight rates at an unreasonably high and discriminatory level. It was further charged that this illegal situation caused injury to every shipper of goods within the State of Georgia. The State, as the plaintiff, alleged that it was economically injured in its proprietary capacity as the owner and operator of a railroad and as a large shipper of goods. However, the State of Georgia further contended that it possessed a cause of action "as *parens patriae* acting on behalf of [its] citizens" (324 U.S. at 450).

The Supreme Court agreed with the position advocated by Georgia, noting that the State had alleged that the illegal conspiracy injured its economy. The Court left no doubts as to the right of a State to initiate actions *parens patriae.*

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, *has injured the economy of Georgia.* Those rights are of course based on federal laws. . . .
>
> "And we find no indication that when Congress fashioned those civil remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the antitrust acts"* (342 U.S. at 447) (Emphasis added).

This line of *parens patriae* cases, culminating in *Georgia v. Pennsylvania Ry. Co.*, clearly recognizes that when private wrongdoers pursue illegal activities directed against a substantial portion of the population of a particular State resulting in the systematic economic exploitation of those private individuals or their property, separate, albeit related, injuries are suffered by the individual citizens and the State itself.

In the instant case, the State of Hawaii has alleged that the respondents managed to dominate and control the market for refined petroleum products in Hawaii and used this combined power to overcharge Hawaiian consumers. Under the ruling of *Georgia v. Pennsylvania Ry. Co.*, this conduct was an actionable wrong harmful to the economy of Hawaii, for which the State may seek remedies in this *parens patriae* action which are appropriate to compensate it for the injury suffered, and to enjoin further harm.

In this case, as in the *Georgia* case, the State of Hawaii has alleged direct pecuniary injury which it has suffered in its operation of public agencies and institutions. In this case, as in the *Georgia* case, the State has alleged statewide conspiratorial price discrimination in an essential industry, "a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister states" (324 U.S. at 451).

The ruling of the District Court correctly applied the *Georgia* case as binding and controlling precedent, and recognized that the State of Hawaii's amended complaint properly alleges its case as *parens patriae*. The State is suing in its own right, not derivatively on behalf of pri-

vate citizen-consumers; and the wrong perpetrated by respondents was a widespread one diffused over such a large and substantial portion of the inhabitants that no effective remedy exists on an individual basis.

Accordingly, the judgment of the Court of Appeals, reversing the District Court and remanding the case for dismissal of the *parens patriae* claim is clearly inconsistent with this Court's prior rulings. The State of Hawaii's petition for a writ of certiorari should be granted.

III. REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS IS NECESSARY TO SETTLE THE QUESTION OF THE PROPRIETY OF THE STATE, SUING AS PARENS PATRIAE, TO RECOVER DAMAGES UNDER SECTION 4 OF THE CLAYTON ACT.

Having established the propriety of this *parens patriae* action, under *Georgia v. Pennsylvania Ry. Co., supra,* as a remedy against a statewide, pervasive, price-fixing conspiracy which victimizes the citizen-consumers of the State of Hawaii, it cannot be denied that injunctive relief must be available to prevent the continuation of such an antitrust violation. *Georgia v. Tennessee Copper Co., supra; Pennsylvania v. West Virginia, supra.*

The Court of Appeals below ruled, however, that under no circumstances can the State of Hawaii recover damages in our present case, suggesting that:

(1) that an injury to the economy and well-being of the State is not an injury to "business" or "property" and hence not compensable under the antitrust remedies provided by Congress; and

(2) the State does not have standing, as *parens patriae*, to sue for money damages under Section 4 of the Clayton Act because any injury as such would be so indirect and remote as to be outside the "area of the economy" which was threatened by the respondents' antitrust violation;

(3) an injury to the economy or well-being of the State, if any, would be incapable of computation of money damages and hence not provable in a court of law.

The Court of Appeals neglected to explain what would become of the vast amounts of money that (accepting the allegations of the complaint as true) respondents have illegally extracted from the economy of Hawaii and the citizen consumers of that State. But that consideration aside, the law as construed, developed, and articulated by this Court in defining the nature of *parens patriae* actions and the policy of enforcement of the antitrust laws through civil treble-damage litigation, recognizes the propriety of recovery of money damages as sought by the State of Hawaii in this action.

A. Georgia v. Pennsylvania Ry. Co. Recognizes that All of the Civil Remedies and Sanctions of the Antitrust Laws Are Available to the State in an Action as Parens Patriae.

In *Georgia v. Pennsylvania Ry. Co., supra,* as in our case, the State sought relief from defendants who were engaged in a conspiracy in violation of the Sherman Act. Georgia sued in its proprietary capacity (Third Count); as *parens patriae* in its sovereign capacity for injury to its economy (First Count), and in its quasi-sovereign capacity as agent and protector of its citizens at large

(Second Count); and finally on behalf of shippers in the State who were adversely affected by the conspiracy. In our present case the State of Hawaii likewise sues in its proprietary capacity (Count One); as *parens patriae* in its sovereign and quasi-sovereign capacities for injuries to the economy of the State and the wrongful extraction of revenues from its citizens (Count Two).

As *parens patriae,* Georgia sought "token damages" of *at least* ten million dollars ($10,000,000), for the injuries caused to its economy and citizenry. Similarly, in the present case the State of Hawaii seeks money damages arising out of respondents' price fixing conspiracy which adversely affected the economy of the State and wrongfully extracted revenues from its consumers.

In *Georgia,* the Supreme Court ruled that an illegal conspiracy which operates to discriminatorily inflate prices for an essential service or commodity within a state is a wrong which harms the economy of that State. Thus, under *Georgia v. Pennsylvania Railroad,* such a wrong is "a matter of grave public interest in which the State, as the representative of the public, has a concern apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law" (324 U.S. at 451); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). And as the Court ruled in *Kansas v. Colorado,* 206 U.S. 46, 99, the State of Hawaii:

> ". . . is not acting directly and solely for the benefit of any individual citizen to protect his [private] rights. Beyond its property rights it has an interest as a state. . . . Its prosperity rises, therefore, above a mere question of local, private right and involves

a matter of state interest, and must be considered from that standpoint."

In short, Hawaii's right as *parens patriae* to bring this action exists as "an interest independent of and behind the titles of its citizens." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *Georgia v. Pennsylvania Railroad, supra.*

Again turning to the controlling language of *Georgia v. Pennsylvania Railroad* (324 U.S. at 447), it is clear that in a *parens patriae* action the State of Hawaii is entitled in the present civil litigation to avail itself of all the remedies of the federal antitrust laws, including the right to collect damages for the injuries which it has suffered:

"But when it came to other *sanctions,* Congress followed a different course and authorized civil *suits* not only by the United States, but by other persons as well. And we find no indication that when Congress fashioned those civil *remedies,* it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae,* have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the antitrust acts" (324 U.S. at 447). (Emphasis added.)

In distinguishing *Oklahoma v. A.T.& S.F.R. Co., supra,* the Supreme Court went on to rule:

"This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the *gravamen of which runs far beyond the claim of damage to individual shippers.*

> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor *meets the standards of justiciability* and since *Georgia is a 'person' entitled to enforce the civil sanctions* of the antitrust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail." (324 U.S. at 452.) (Emphasis added.)

Notice that in the above quotations from the most relevant and authoritative decision applicable to our present case, this Court recognized that a *parens patriae* action (such as petitioner's herein) may be used to pursue "civil *remedies*" under the federal "antitrust *acts*" and as such it is an appropriate vehicle "to enforce the civil *sanctions* of the anti-trust *laws*." The use of the plural form in all of these words cannot be regarded as coincidental, especially in light of the substantial request for damages of at least ten million dollars which Georgia made as *parens patriae*. Rather they indicate that the full spectrum of civil antitrust remedies, including damages, is available in a *parens patriae* suit. There is nothing in the Court's language that would negate the propriety of damages in the present case.

In the *Georgia* case, the state did seek damages in its proprietary capacity and as *parens patriae*. The Supreme Court denied the State's request for damages, not because the suit was *parens patriae*, but solely because the suit involved the railroad and shipping industry where Congress had prohibited rebates. *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156. As the Supreme Court stated in *Georgia* (324 U.S. at 453):

> "If a shipper could recover under Section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate operate to give him a preference over his trade competitors."

Thus, this Court was of the view that if the State of Georgia was permitted to recover any money damages whatsoever arising out of the illegal over-charge—irrespective of the capacity in which it was suing or the Count under which the recovery was obtained—such damages would effectively operate as a preferential rebate in violation of the Congressionally established I.C.C. transportation policy. It is significant, in light of the substantial prayer for damages by Georgia as *parens patriae*, that this Court did not rule, nor did it even suggest, that money damages could not be recovered merely because of the *parens patriae* nature of the claim.

The Court of Appeals below, however, seized upon the superficial fact that no damages were awarded to Georgia and, rather than analyzing the reasons for denial of damages, erroneously concluded that damages may never be recovered by a state as *parens patriae* under Section 4 of the Clayton Act. The Court of Appeals recognized the right of a state as *parens patriae* to seek injunctive relief under Section 16 of the Clayton Act (15 U.S.C. §26) and ruled that *Georgia v. Pennsylvania Ry. Co.* authorized nothing more.

In so ruling, the Court of Appeals ignored the historically recognized parellelism between the purposes underlying and the interests protected by both Sections 4 and

16 of the Clayton Act. Section 16 permits a party in a civil action to obtain injunctive relief only if that party can demonstrate ". . . a threatened loss or damage . . ." to economic interests which are personal to the plaintiff. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954). As this Court stated in the *Borden* case:

> "Under Section 16 of the Act, 15 U.S.C. §26, a private plaintiff may obtain injunctive relief against such violations only on a showing of "threatened loss or damage"; and this must be of a sort personal to the plaintiff, *Beegle v. Thomson*, 7 Cir. 1943, 138 F.2d 875, 881. *The private-injunction action, like the treble-damage action under §4 of the Act*, supplements Government enforcement of the antitrust laws. . . ." 347 U.S. at p. 518. (Emphasis added.)

Thus, only if an antitrust plaintiff suffers an injury or is threatened with an injury to his economic or property interests is he allowed to seek relief through damages or injunction. It is, therefore, inconsistent to hold, as the Court of Appeals suggests, that the injury to the State of Hawaii was of sufficient economic or proprietary impact to confer standing on it as *parens patriae* to seek injunctive relief under Section 16, but not damages under Section 4. As this Court has most recently observed in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) the only difference between the injunctive and treble-damage remedies is that the latter requires proof of past injury whereas the former requires proof of "threatened" injury. 395 U.S. at p. 130. Moreover, in making it clear that both civil remedies seek to vindicate the same private interests and public policies, the Court observed in *Zenith* that:

"We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by §16, should not respond to the 'salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.' *NLRB v. Express Publishing Co., supra,* 312 U.S. at 436. Although a district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violation found by the court, e.g. *New York, N.H. & H.R. Co. v. ICC,* 200 U.S. 361, 401 (1906), '[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.' *International Salt Co. v. United States,* 332 U.S. 392, 400, 68 S. Ct. 12, 17, 92 L.Ed. 20 (1947). *This is particularly true in treble-damage cases,* which are brought for private ends, but which also serve the public interest in that 'they effectively pry open to competition a market that has been closed by defendants' illegal restraints.' *Id.,* at 401." 395 U.S. at p. 133. (Emphasis added.)

Under our law, injunctive relief is an equitable remedy which is appropriate only in extraordinary cases. Damages, on the other hand, is a more commonplace remedy and hence more readily available. Yet the Court of Appeals, in a classic example of quoting a sentence out of context, observed that *Georgia v. Pennsylvania Ry. Co.* involved an injunction to deter an illegal combination then cited this Court's language in the case at 324 U.S. at p. 462: "No more is envisaged here."

That statement in the *Georgia* case was made with respect to the propriety of granting an injunction which

would affect future shipping rates, the setting and approval of which is under the jurisdiction of the Interstate Commerce Commission. The words: "No more is envisaged here", do not imply, as the Court of Appeals suggests, that *parens patriae* damage actions are out of the question. Rather, when read in context, this sentence merely indicates that the granting of an injunction restraining defendants from illegally and coercively fixing rates would not interfere with the policies and subsequent official rate regulations of the I.C.C.

> "No more is envisaged here. If the alleged combination is shown to exist, the decree which can be entered will be no idle or futile gesture. It will restore that degree of competition envisaged by Congress when it enacted the Interstate Commerce Act. It will eliminate from rate-making the collusive practices which the anti-trust laws condemn and which are not sanctioned by the Interstate Commerce Act. It will supply an effective remedy without which there can be only an endless effort to rectify the continuous injury inflicted by the unlawful combination." 324 U.S. at p. 462.

This example of the Court of Appeals' confusion reemphasizes the fact that the *Georgia* case must be read as recognizing that the injury suffered by a State as *parens patriae* as a result of a pervasive antitrust conspiracy as alleged herein is a wrong which injures a protectable interest of the State. And this ". . . is not merely a remote or ethical interest, one which is immediate and recognized by law." *Georgia v. Pennsylvania Ry. Co.*, 324 U.S. at p. 451. Since the injury to the State of Hawaii caused by respondents' antitrust violation is recognized by law it is amenable to the civil antitrust remedies pro-

vided by law, including the treble-damage action of Section 4.

Unlike the *Georgia* case, our present action does not involve the transportation industry or any other industry whose rates and prices are set by federal law. Therefore the reasoning in *Georgia* which precluded recovery of damages does not apply in the case now before this Court. And it must be recognized that petitioner herein may utilize all available antitrust remedies—damages as well as injunctive relief to vindicate the injury to its interest ". . . which is immediate and recognized by law." The District Court, then, after a careful reading of the entire *Georgia* opinion properly concluded that the only rational inference to be drawn from that case is that an antitrust claim for damages as *parens patriae* was properly asserted by Georgia there and by Hawaii here. As the lower Court incisively stated:

> "Certainly the broad objectives of the antitrust statutes are not to be meanly or narrowly curtailed because it is a state that brings a damage claim thereunder in a *parens patriae* capacity." (R. 63-64.)

B. The State of Hawaii Has Standing Under Section 4 of the Clayton Act to Maintain this Action for Damages, as Parens Patriae.

The Court of Appeals ruled that petitioner's suit as *parens patriae* was not cognizable under Section 4 because the State of Hawaii was not injured in its "business" or "property". The crucial issue which this Court must resolve is whether an injury to the economy of the State of Hawaii constitutes a well-defined and compensable economic loss. Petitioner submits that this Court has pre-

viously answered that question in the affirmative in *Georgia v. Pennsylvania Ry. Co., supra,* where it ruled:

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, *has injured the economy of Georgia.* Those rights are of course based on federal laws . . .
>
> "And we find no indication that, when Congress fashioned those civil remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the antitrust acts.*" 324 U.S. at p. 447.) (Emphasis added.)

In our case, the District Court properly followed the dictates of *Georgia* and recognized that suits *parens patriae* are included within the purview of *all* civil antitrust remedies. If the economy of a state can be injured by monopolistic activity, sound antitrust enforcement policy demands that civil actions initiated pursuant to Section 4 be available to remedy such injuries. However, the Court of Appeals in open defiance of the *Georgia* ruling, questioned whether the economy of a state could in fact be injured by pervasive antitrust conspiracies such as those involved in *Georgia* and in our present case:

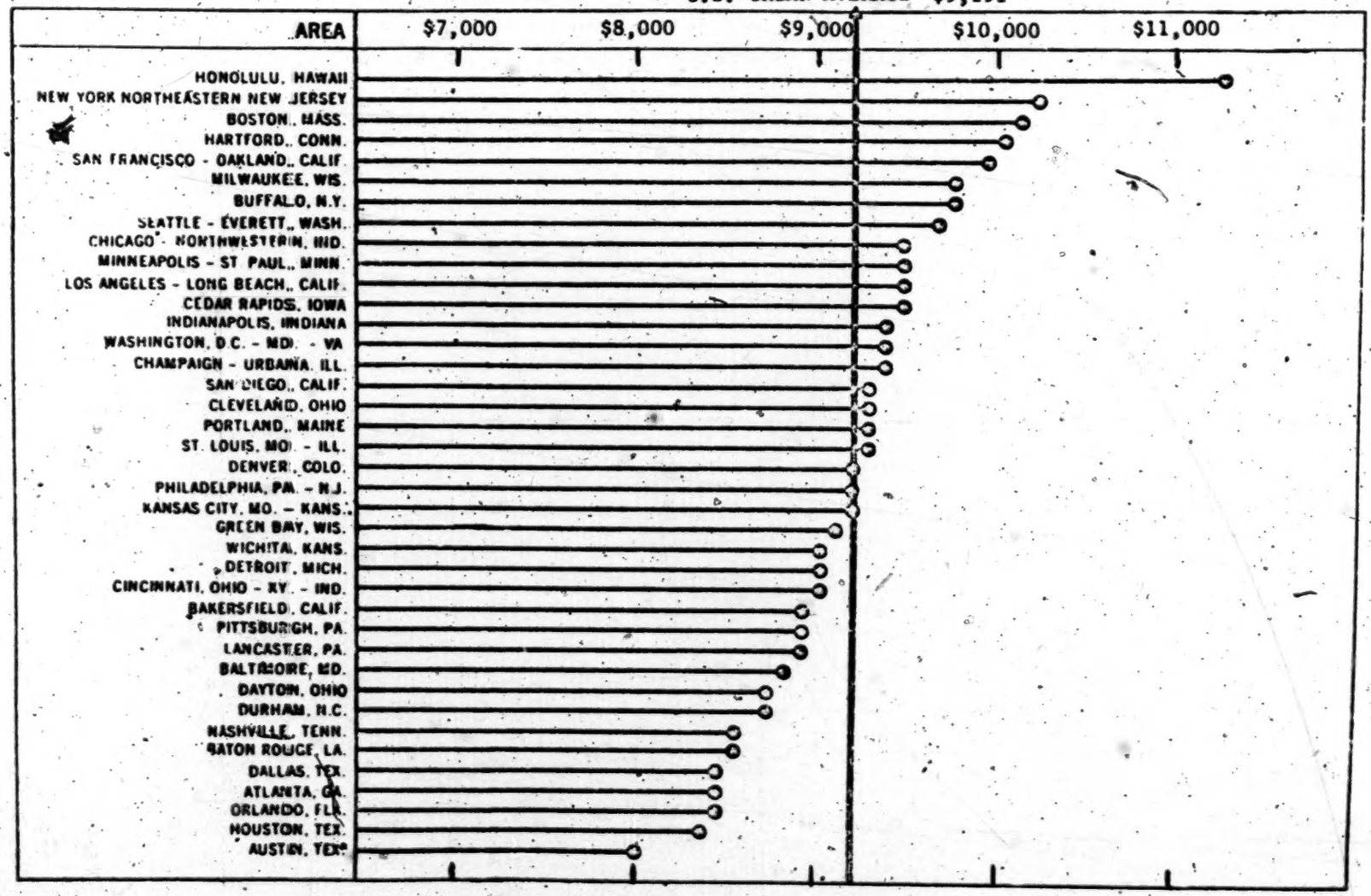
It would seem clear that *Georgia,* and a score of other *parens patriae* decisions of this Court establish as a matter of law that private tortious conduct directed against a state or a substantial portion of the state's population is

an injury to the state itself. Certainly, a pervasive price-fixing conspiracy such as is alleged herein, involves economic wastage and a misallocation of economic resources. Demetz, *Toward a Theory of Property Rights,* 57 American Econ. Review (1967). To the extent that the price-fixing conspiracy of the respondents operates here to "bleed" the economy of the State of Hawaii, it damages and detracts from various private proprietary interests held and limits the development of industrial opportunities—current and anticipated—within the State, and in turn, diminishes the tax base of that State. This is not only an injury to the business and property of the State, but also involves the kind of "economic inefficiency" [C.L. Allen, *The Framework of Price Theory,* p. 212 (1967)] which the antitrust laws are designed to prevent. See also: Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo. Wash. L. Rev. 1031, 1048 (1969). In this age of advanced economic development, a statewide price fix on a widely used consumer commodity has a tremendous impact not only on the direct purchaser, but on the economy of the state as a whole. Samuelson, *Economics, an Introductory Analysis,* 265-267 (1951); Note, *Antitrust Remedies,* 23 Vanderbilt L. Rev. 405, 409-411 (1970). Manufacturing, farming, shipping, any industry requiring transportation by motor vehicle, are inevitably affected by such a price conspiracy. As the District Court so astutely observed (R. 62):

> "The court would judicially notice that there is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other

COMPARATIVE LIVING COSTS
MEASURED BY
THE CITY WORKER'S FAMILY BUDGET
(moderate living standards, autumn 1966)

U.S. URBAN AVERAGE = $9,191



SOURCE: U.S. Department of Labor - Bureau of Labor Statistics
Autumn, 1966 - Bulletin No. 1570-1, p. 12.

petroleum products referred to in the present complaint, and perforce therefore, the cost thereof."

One example of the type of harm which has been caused by price-fixing conspiracies such as that alleged against respondents herein is the artificially inflated price structure for necessary items. Such price-fixing and area price discrimination leads to an overall and disproportionate increase in cost of living for the residents and consumers in the geographical area (here, the State of Hawaii) which is victimized by the conspiracy. (See Comparative Living Costs Table, U.S. Dept. of Labor Bulletin No. 1570-1, p. 12, Autumn, 1966 reprinted opposite).

The Court of Appeals, then, failed to see the nature and extent of the injury to the State of Hawaii. Moreover, it failed to recognize that the word "property" in Section 4 of the Clayton Act includes all economic injuries to a plaintiff which the antitrust laws seek to prohibit. Compare: *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir. 1966); *Mulvey v. Samuel Goldwyn Productions, supra; Waldron v. British Petroleum Co.*, 231 F.72 (S.D.N.Y. 1964).

In defining the type of "property" interests protected under Section 4 of the Clayton Act, the Court in *Waldron, supra* stated:

> "The statute explicitly uses the words 'business or property' in the disjunctive. Congress intended this distinction to be meaningful. The word 'property' has wider scope and is more extensive than the word 'business'. *Less is required to prove 'property' than to prove 'business'.*

> "*The statute does not set up a qualitative or quantitative test to determine the existence of 'property'.* Nor does the statute contain a built-in definition.
>
> "The word 'property' is, in a sense, a conclusory term, i.e., *an interest which the law protects.* A determination whether plaintiff has 'property' involves a *value judgment as to whether that which plaintiff factually possesses should be legally protected.* If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses 'property' ". 231 F.Supp. at 86. (Emphasis added.)

This Court, in *Georgia v. Pennsylvania Ry. Co., supra,* has already made the "value judgment" that an injury to the economy and well-being of the state in its *parens patriae* capacity is the type of "property" protected by the antitrust laws. Therefore, the injury caused by respondents herein to that property interest of the State of Hawaii may be remedied by a damage action pursuant to Section 4. Inasmuch as petitioner has shown that it is within the class of persons entitled to the protection of the antitrust laws, and that the injury caused is the type that the antitrust laws seek to prevent, both national policy and the law as articulated by this Court demand that petitioner be accorded the right to maintain and pursue this present action. See, for example, *South Carolina Council of Milk Producers v. Newton, supra,* 360 F.2d at pages 418-419, citing 64 Colum. L. Rev. 570, 585, (1964). See also: *Perkins v. Standard Oil of California,* 395 U.S. 642, 648 (1969); and *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 700-701 (1962).

C. The Court of Appeals Erroneously Ruled that the Injury to the State of Hawaii Was so Incidental, Remote and Indirect as to be Outside the "Target Area" of Respondents' Antitrust Violation.

The Court of Appeals below stated that, even were it to accept the notion of injury to the economy of a State as a result of an antitrust violation such as is alleged here, ". . . such injury is indirect and consequential. . . ." The Court of Appeals went on to state that "It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act", citing many of the so-called "target area" cases such as *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2nd Cir. 1958); *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3rd Cir. 1956); *cert. denied*, 352 U.S. 890 (1956); *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3rd Cir. 1910); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678 (2nd Cir. 1955). These decisions and others indicate that when an antitrust violation is "aimed at" a particular class of victims, the shareholders, lessors, creditors and others who are "outside that area of the economy endangered" by the violation have no standing to maintain an action under Section 4 even though they suffered injury.

Initially, the Court below failed to recognize that this "target area" concept is a somewhat artificial limitation upon an antitrust plaintiff's standing to sue and one which runs counter to the national policy in favor of vigorous private enforcement procedures. See the numerous decisions and quotations of this Court set out in the Argument, above: *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., supra; Radovich v. National Football*

League, supra; Perma-Life Mufflers, Inc. v. International Parts Corp., supra; Lawlor v. National Screen Service Corp., supra. This Court has never approved of the "target area" limitation. 64 Colum. L. Rev. 570, 585 (1964).

The Court of Appeals also failed to recognize or even address itself to the more recent and enlightened line of "target area" cases which have established that a plaintiff is within the endangered area of the economy and thus has standing to sue under Section 4 if it could reasonably be foreseen that the plaintiff would be affected by the illegal conduct. *Mulvey v. Samuel Goldwyn Productions, supra; South Carolina Council of Milk Producers v. Newton, supra.* Ironically, it has been the Ninth Circuit itself which has led the way toward the more enlightened view of standing. In *Twentieth Century-Fox Film Corp. v. Goldwyn, supra* the Ninth Circuit Court ruled that:

> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather it was intended to express the view that plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." 328 F.2d at p. 220.

See also: *Hoopes v. Union Oil Co., supra* and *Mulvey v. Samuel Goldwyn Productions, supra.*

In *Georgia v. Pennsylvania Ry. Co., supra,* this Court made it clear that a widespread and pervasive private

antitrust conspiracy aimed at businessmen or consumers within a particular State causes an independent injury to the State itself. In our case, the State of Hawaii and its citizen-consumers of petroleum products were the specific targets of the respondents' anti-competitive conspiratorial conduct. Because of Hawaii's relatively isolated geographical location, the State and its citizens became easy prey for the respondents. The complaint clearly alleges that the illegal price-fixing by respondents directly resulted in a discriminatorily inflated price structure being imposed for petroleum products within the State of Hawaii. Thus, under the *Georgia* case, respondents must be held to have been reasonably able to foresee that their illegal conduct would have adversely affected the Hawaii economy.

Therefore, even if this Court accepts the "target area" limitation on standing, the injury to petitioner here was of the type that could reasonably have been foreseen by respondents to have resulted directly from their illegal conduct.

This Court has recently had occasion, in a different context, to consider the standing of a party to sue under federal statutes. *Association of Data Processing Service Organizations, Inc. v. Camp.*, —— U.S. ——, 90 S. Ct. 827 (1970); *Barlow v. Collins*, —— U.S. ——, 90 S. Ct. 832 (1970). In *Data Processing*, this Court articulated two general standards for determining the propriety of a plaintiff's standing:

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." 90 S. Ct. at p. 829.

"[The second question is] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest, at times, may reflect 'esthetic, conservational, and recreational' as well as economic values. *Scenic Hudson Preservation Conference v. FCC*, 354 F.2d 608, 616; *United Church of Christ v. FCC*, 359 F.2d 994, 1000-1006 . . . We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioner relies here. Certainly he who is 'likely to be financially injured', *Commission v. Sanders Radio Station*, 309 U.S. at 417, may be a reliable private attorney general to litigate the issues of the public interest in the present case." 90 S. Ct. at p. 830.

In stating the requirements for standing in *Data Processing* and *Barlow, supra,* the Court de-emphasized the necessity that the plaintiff actually show a tangible economic interest in himself. Whether plaintiffs can in fact prove injury adequate to support recovery relates to the *merits* of their claim, not to the preliminary question of standing. Such issues are pertinent only to the damage aspects of these cases, and have no relevance to standing to sue. And, when it comes to the issues of damages, this Court has been most specific in demanding that an anti-trust plaintiff be given full opportunity to establish—before the jury—the nature and extent of the economic injury suffered as a result of the illegal anti-competitive conduct charged. *Bigelow v. R.K.O. Radio Pictures, Inc., supra.*

A careful reading of the opinion of the Court of Appeals below demonstrates that the Court had concluded that an injury to the economy of the State was not the kind of injury which could be identified, ascertained or calculated in a legal proceeding. This underlying assumption by the Court below appears to have controlled its ruling that the damages, if any, were too remote, attenuated, and indirect to support petitioner's standing herein.

But *Georgia v. Pennsylvania Ry. Co., supra,* establishes that such an injury to the economy of the State is one which the antitrust laws recognize and prohibit. Moreover, the civil damage action is such an essential and integral part of national antitrust enforcement policy that this Court has recognized that such a suit will not fail merely because the precise amount of damages is difficult to ascertain. Monopolists cannot be allowed to go free and enjoy the profits of their illegal conduct merely because their conspiracy was so effective and pervasive that damages are difficult to measure. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931); *Bigelow v. RKO Radio Pictures, Inc., supra; Zenith Rudio Corp. v. Hazeltine Research, Inc., supra;* see also: *Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc.,* 356 F.2d 371, 379 (9th Cir. 1966). In *Bigelow* the Court stated:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the *jury may make a just and reasonable estimate of the damage based on relevant data* and render its verdict accordingly. In such circumstances 'juries are allowed to act on

> probable and inferential as well as upon direct and positive proof'. . . . *Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.* It would be an inducement to make the wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. The most elementary conceptions of justice and public policy require that the *wrongdoer shall bear the risk of the uncertainty which his own wrong has created.*'' 327 U.S. at pp. 264, 265. (Emphasis added).

One noted antitrust lawyer has put it this way:

> ''Juries, being gifted with the power to put a dollar value on a person's reputation, or his eyesight, or his wife's affections, or even his life itself, should have little trouble with so relatively simple a proposition as measuring in dollars the amount of injury a monopolist . . . or a conspirator has inflicted upon his victim's business or property.'' Rowley, *Proof of Damages in Antitrust Cases,* 32 A.B.A. Antitrust L.J. 75 (1966).

In accord with this spirit, Courts have liberally permitted antitrust plaintiffs to introduce as evidence any ''relevant data'' which would aid the jury in calculating the amount of damages involved. In our present case, the Court of Appeals summarily interdicted this function of the jury and implied that an injury to the economy of the State of Hawaii was, as a matter of law, dubious, and could not, in all likelihood, be proven.

Not only does this analysis by the Court of Appeals run counter to national antitrust policy and the rulings

in *Georgia* and *Bigelow*, it violates the specific theory of standing of antitrust plaintiffs developed and articulated by this Court:

> "Where plaintiff proves a loss, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that *the jury*, as the trier of the facts, *must be permitted to draw from this circumstantial evidence the* inference that the necessary causal relation exists." *Continental Ore Co. v. Union Carbide & Carbon Co., supra,* 370 U.S. at p. 697. (Emphasis added.)

See also, to the same effect: *Perkins v. Standard Oil Co. of Calif., supra; Radiant Burners v. People's Gas & Light Co., supra; Radovich v. National Football League, supra.*

In the final analysis, the national policy in favor of the Section 4 civil damage action supports the maintenance of this action. *Parens patriae* suits may be brought under the antitrust laws. Therefore, the State of Hawaii must be permitted to recover damages from the respondents for the vast amounts of revenue which they have illicitly extracted from the economy of the State. This Court must reject the technical and formalistic arguments which seek to legitimate the unjust enrichment respondents have enjoyed, and which would result in abolishing the important avenue for consumer protection recognized in the *Georgia* case. The *parens patriae* claim here asserted must be permitted to proceed to trial where a jury can consider the relevant economic data (including expert witness testimony) and make a just and reasonable estimate of the damages.

IV. THE PETITIONER, STATE OF HAWAII, SHOULD BE PERMITTED TO MAINTAIN ITS ACTION UNDER SECTION 4 OF THE CLAYTON ACT AS THE REPRESENTATIVE OF THE INTERESTS OF ITS CITIZENS.

Primarily, the position of the petitioner herein, consistent with the theory underlying *Georgia v. Pennsylvania Ry. Co., supra,* is that the respondents' pervasive conspiracy caused an injury to the economy of the State of Hawaii, which injury is separate and independent from the harm caused to the various individual consumers. Under *Georgia,* the injury to the economy must be viewed either as an injury to "property" or as being another form of economic interest which Congress intended to protect through Section 4.

Irrespective of the petitioner's primary theory, there exists an alternative rationale which, when read in the light of the national policy favoring antitrust enforcement through the civil damage action, clearly supports the propriety of the present suit and the standing of the State of Hawaii as *parens patriae.*

Historically, it has been recognized that the State as *parens patriae* may bring civil actions as the *representative* of its citizens and to remedy wrongs committed against a substantial portion of the citizenry. Such certainly reflects the situation in the present case. The hundreds of thousands of consumer-citizens of the State of Hawaii cannot feasibly protect themselves. Their claims, as individuals, are too small to justify litigation. Respondents have already successfully argued that the consumers, as a class, are too large and diverse. Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo. Wash. L. Rev. 1031 (1969); Note, *Antitrust Remedies,*

23 Vanderbilt L. Rev. 405, 411-412 (1970). Thus the instant case fits the classic example of permitting a State, as *parens patriae,* to sue on behalf of its injured and otherwise remediless citizens.

The complaint filed in the present case by the petitioner alleges that the State ". . . brings this action by virtue of its duty to protect the general welfare of the State *and its citizens, acting herein as parens patriae, trustee, guardian and representative of its citizens, to recover damages. . . .*" (R. 50). (Emphasis added). The Court of Appeals ignored this theory of petitioner's case.

This Court has recognized the propriety of the State suing private wrongdoers as the representative of its injured citizens. *Georgia v. Tennessee Copper Co., supra.* In *Missouri v. Illinois,* 180 U.S. 208, 241 (1901) the Supreme Court stated that ". . . if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." In *New York v. New Jersey,* 256 U.S. 298 (1921) the Court stated:

> "The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the State is the proper party to represent and defend such rights. . . ." (at 301-302).

An alternative statement of the standard applied to determine whether an adequate state interest is present to support a suit *parens patriae* is whether a substantial portion of the State's citizens have an interest in the controversy. In *Kansas v. Colorado,* 185 U.S. 125, 142

(1901) the Supreme Court entertained an action *parens patriae* holding that a State had the right to invoke its original jurisdiction "as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens. . . ." In *Land O'Lakes Creameries v. Louisiana*, 160 F.Supp. 387 (E.D. La. 1958), a three-judge Court expressed the standard with regard to "a substantial number" of a State's citizens.

Significantly, the same theory was advanced by the State in its second count in *Georgia v. Pennsylvania Ry. Co., supra*. As noted previously, Georgia sought damages of $10,000,000.00 under these alternate theories of *parens patriae* recovery. In its opinion this Court observed that, as *parens patriae*, the State could utilize the remedies under the antitrust laws to redress injuries to its economy or to the well-being of its citizenry at large and seemed clearly to imply that the State could have recovered damages but for the Interstate Commerce Commission anti-rebate policy.

Moreover, it should be noted that in the landmark *parens patriae* case of *Georgia v. Tennessee Copper Co., supra*, this Court ultimately entered a decree which included a provision that the Tennessee Copper Co. ". . . undertook annually to supply a fund to compensate those injured by fumes from its works. . . ." 237 U.S. 474, 476 (1915).

The argument made by respondents herein, and accepted by the Court of Appeals below, when taken to its logical conclusion, is that although they illegally conspired to inflate the prices for their products and although this pervasive artificial pricing structure occurring in the

major and socially important oil industry injured the economy of the State of Hawaii and illegally extracted large sums of money from the citizen-consumers in that State, the wrongdoers are entitled to retain their illicit profits and defeat the efforts of the State as *parens patriae* to obtain remedial compensation for either the injury which was inflicted upon the economy and well-being of the State, or the injury inflicted upon the hundreds of thousands of citizen-consumers who are without an otherwise effective and available remedy. The law has never and need never be so blind and helpless in the face of such monumental illegality and wrongdoing. Compare: *In Re Permian Basin Area Rate Cases*, 390 U.S. 747, 825-828 (1968); *Wisconsin v. F.P.C.*, 373 U.S. 294 (1963); *California v. F.P.C.*, 296 F.2d 348 (D.C. Cir. 1961); *Guam v. Fed'l Maritime Comm.*, 329 F.2d 251 (D.C. Cir. 1964). Indeed, even taking the most narrow and limited view of the language of Section 4 of the Clayton Act, the numerous *parens patriae* cases cited above recognize that the State of Hawaii here has, as one of its most important aspects of "business", the task of protecting the safety, welfare and property of its citizens. To the extent that the conspiracy here alleged against respondents detracted from the State ability to perform this important business function, then, the State of Hawaii was injured and has standing to remedy that injury to its business under Section 4.

But this Court should not be content with so narrow a reading of the antitrust laws. Instead, the present petition for a writ of certiorari should be granted to enable the Court to reassert the validity of *Georgia v. Pennsyl-*

vania Ry. Co., supra, and the numerous other cases cited herein which broadly construe the availability of the civil damage remedy as a necessary component to the enforcement of national antitrust policy. This important federal interest can be achieved only by this Court's rejection of the ruling of the Court of Appeals, the effect of which necessarily permits antitrust violators to retain the enormous profits derived from their illicit practices.

CONCLUSION

For the reasons stated above, this Honorable Court should grant the petition for writ of certiorari sought herein by the State of Hawaii.

Dated, December 1, 1970.

Respectfully submitted,

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Counsel for Petitioner.

(Appendices Follow)

Appendix I

In the United States District Court
for the District of Hawaii

Civil No. 2826

Filed: July 2, 1969

State of Hawaii,
Plaintiff,

vs.

Standard Oil Company of California, Union Oil Company of California, Shell Oil Company, and Chevron Asphalt Company,
Defendants.

DECISION ON PLAINTIFF'S PARENS PATRIAE COUNT

The State of Hawaii brought this antitrust action against three oil companies and a subsidiary of one, alleging in Count I of its Fourth Amended Complaint, basically, that the defendants violated Sherman 1 and 2 by bid rigging, price fixing, market monopolization, and other acts in restraint of trade, and asks for damages based upon the illegal excess prices paid for defendants' products by the State in its proprietary capacity, as a buyer of petroleum products.

In Count II the State "brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged."[1] Plaintiff continues to allege that the combination and conspiracy of the defendants in restraint of trade and to monopolize the sale, marketing and distribution of refined petroleum products has "injured and adversely affected the economy and prosperity of the State of Hawaii" by:

> "(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;
>
> "(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;
>
> "(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
>
> "(d) the full and complete utilization of the natural wealth of the State has been prevented;
>
> "(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;
>
> "(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;
>
> "(g) the Hawaii economy has been held in a state of arrested development."[2]

---

[1]Fourth Amended Complaint, Paragraph 19.
[2]Fourth Amended Complaint, Paragraph 20.

Plaintiff then alleges it "has not yet ascertained the precise extent of said damage to itself and its citizens;" but asked leave to insert such sum when ascertained.[3]

Defendants moved to dismiss Count II—maintaining (a) "there can never be a *parens patriae* suit for damages; such a suit lies only in equity, and only for preventive relief;" (b) "Count II does not in fact allege any injury to the general economy of the State of Hawaii, or to Hawaii in its sovereign or quasi-sovereign capacity, that would support a *parens patriae* injunction;" (c) a *parens patriae* suit for damages is not maintainable under Section 4 of the Clayton Act which permits damages only to business and property, arguing that damages to a state's business or property are by definition and nature not damages to its sovereignty or quasi-sovereignty; (d) if dollar damages to the economy of the State were measured by the harm done to the individual inhabitants, there would be created the risk of double recovery, inasmuch as each of the State's inhabitants, in theory at least, would be entitled to sue for any direct damage to his own business or property; and (e) a *parens patriae* suit for damages under the antitrust laws will not lie because an injury to the state's sovereignty is by its very nature too remote or speculative to be measurable in money damages.

The problem has been twice fully briefed and argued by all parties.[4]

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[3]Plaintiff's Count III pled a class action. Defendants' motion to dismiss this count was granted in an oral bench decision, after briefing and argument.

[4]In plaintiff's Third Amended Complaint, the allegations of Count II flirted with the theory of a *parens patriae* claim, and on defendants' motion to dismiss, it was briefed by both plaintiff and

The concept of a *parens patriae* count in an antitrust action of the nature of the present one, emanates from *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), where the Supreme Court granted the State of Georgia's motion to file an amended complaint which alleged and sought relief from an antitrust violation by twenty railroad companies. The amended complaint asserted four counts of injury, the Third and Fourth of which sought treble damages for the alleged discriminatory freight rates charged the State and its citizens.[5] The Supreme Court held that Georgia had properly asserted a cause of action for injunctive and *damage* relief as *parens patriae* as well as proprietor, and permitted the complaint involving the Court's original jurisdiction to be filed. The Court stated:

> "Georgia, suing for her own injuries, is a 'person' within the meaning of § 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. . . . *But Georgia is not confined to suits designed to protect only her proprietary interests.* The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy [which] . . . injured the economy of Georgia. . . . When it came to other *sanctions* Congress . . . authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil *remedies*, it restricted

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defendants as if it had been properly alleged. This court in a prior Memorandum Decision found that a *parens patriae* claim had not been pleaded and dismissed the count with leave to amend. Thus, all parties were given two shots at the same target.

[5] In its supporting brief (page 8) the State of Georgia indicated that it was "not primarily interested in seeking damages for past injuries to the State and her citizens . . . [but in] the future welfare of the State and her people."

the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.*" 324 U.S. at 447. (Emphasis added.)

"Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil *sanctions* of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail." 324 U.S. at 452. (Emphasis added.)

After allowing the State of Georgia to file its complaint seeking both equitable and legal relief and stating that all civil antitrust sanctions are available to the State in both its proprietary and *parens patriae* capacities, the Court ruled that damages based on the allegedly excessive freight rates would not be permissible, solely because they had been approved by the ICC and were therefore "legal" rates.[6] This is the only case which either counsel or the court has uncovered which lends precedential support to the claim that a state may recover money damages, trebled, in an antitrust action under the aegis of a *parens patriae* claim.

There are many cases, however, which have passed upon the primary problem of whether a state has sufficient interest in a controversy to be entitled to sue as *parens patriae*. In the determination of the state's standing to sue, each case poses a question of law which can

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[6]See *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156 (1922) and *Marnell v. United Parcel Service*, 260 F.Supp. 391, 406 (N.D.Cal. 1966).

be determined only by an analysis of the particular facts concerned. Generally it has been the Supreme Court which has determined whether a state has properly stated a claim as *parens patriae*. This is because of the Court's original jurisdiction over controversies between states or between a state and citizens of another state. In passing upon the appropriateness of a *parens patriae* claim, the Supreme Court acted in its capacity as a finder of fact, thus performing a function usually undertaken by a lower tribunal. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907), the Supreme Court permitted the State of Georgia to sue to enjoin fumes from a copper plant across the state border from injuring land in five (5) Georgia counties, very little of which was owned by the State, stating:

> "... [W]e are satisfied by a *preponderance of evidence* that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case [parens patriae]. ..." (Emphasis added.)

Based on its view of the facts, the Supreme Court has entertained suits *parens patriae* to (a) restrain diversion of water from an interstate stream, *Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907); (b) enjoin changes in drainage which increase the flow of water in an interstate stream, *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); (c) preclude restraints on the commercial flow of natural gas, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); and (d) restrain the discharge of sewage into the Mississippi River and New York Bay, *Missouri v. Illinois and Chicago District*, 180 U.S. 208 (1901) and *New York v.*

New Jersey, 256 U.S. 296 (1921). See also *Pennsylvania v. West Virginia*, *supra* at 592, where the Supreme Court, after finding a sufficient basis for a suit *parens patriae*, distinguished certain prior opinions on the ground that "*the facts on which they turned*, as the opinions show, were so widely different from those here that they are not in point." (Emphasis added.)

Conversely, the Supreme Court has rejected the propriety of suits *parens patriae* to (a) enforce claims of a bank's creditors and depositors, *Oklahoma v. Cook*, 304 U.S. 387 (1938); (b) collect claims against another state, which claims, prior to assignment, belonged to citizens of the prosecuting state, *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); (c) recover for injury allegedly resulting from unlawful freight rates charged its citizen-shippers, *Oklahoma v. A.T. & Santa Fe Ry.*, 220 U.S. 277 (1911); and (d) enjoin alleged interference with interstate commerce resulting from state quarantine regulations, *Louisiana v. Texas*, 176 U.S. 1 (1900).

An analysis of the above cases indicates that if a state is to maintain an action in its *parens patriae* capacity, *initially* the facts must show that the state has an interest "independent of and behind the titles of its citizens," *Georgia v. Tennessee Copper Co.*, *supra*; "has an interest apart from that of the individuals affected," *Pennsylvania v. West Virginia*, *supra*; "must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest," *Oklahoma v. Cook*, *supra*; "[it] must appear that the controversy to be determined is . . . not a controversy in the vindication of grievances of particular individuals,"

Louisiana v. Texas, supra. Thus the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The two *theories for recovery* of damages are separate and distinct. (At this stage, we do not concern ourselves with the nature of proof.) So, here, the State in the guise of *parens patriae* cannot recover for the individual and several possible damage claims of its many citizen-consumers of petroleum products. As the preceding cases unmistakably set forth, and as the dissent in *Georgia v. Pennsylvania R. Co., supra,* points out:

> "The inhabitants of the State who have suffered injury or who are threatened with injury by the unlawful practices alleged . . . . are alone entitled to seek a legal remedy for their injury, and are the proper parties plaintiff in any suit to enforce their rights which are alleged to have been infringed. It has long been settled by the decisions of this Court that a State is without standing to maintain suit for injuries sustained by its citizens and inhabitants for which they may sue in their own behalf." 324 U.S. at 473.

The cases also make manifest a *second prerequisite* which must be met before a state may sue in *parens patriae*, viz., the state has standing to sue in that capacity only if a substantial portion of the inhabitants of the state are adversely affected by the challenged acts of the defendants, For example:

> ". . . [T]he interests of the single industry here involved must be held to be private interests, not interests *affecting the whole economy* or *all the people of the state.* This type of interest is insufficient to

give Minnesota the right to sue as parens patriae on behalf of all, or a *substantial number*, of her citizens." *Land O'Lakes Creameries v. Louisiana*, 160 F.Supp. 387, 389. (Emphasis added.)[7]

". . . [T]he mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae*, trustee, *guardian* or representative of *all or a considerable portion of its citizens*. . . ." *Kansas v. Colorado*, *supra*, at 99. (Emphasis added.)[8]

Thus, if a "substantial number", "or a considerable portion of [Hawaii] citizens" are adversely affected by the alleged acts of the defendants, Hawaii would have the requisite standing to sue as *parens patriae* on behalf of the totality of those citizens. While a state may not sue, *parens patriae*, for the recovery of possible individual damages or claims of its inhabitants, nevertheless if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity.

As was conceded by counsel and as this court would judicially notice, there are almost 300,000 motor vehicles operating in this state with approximately 800,000 inhabitants. If more facts were needed, in this State where the grass never ceases to grow, gasoline-powered lawn mowers are as thick as the proverbial fleas on a dog.

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[7]See also *Jones, Governor ex rel. Louisiana v. Bowles*, 322 U.S. 707 (1944).

[8]See also *Kansas v. Colorado*, 185 U.S. 125, 142 (1902) and *Missouri v. Illinois & Chicago District*, *supra*, at 241.

These two categories, of course, do not cover all of the engines in Hawaii that are powered by petroleum products. The court would judicially notice that there is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other petroleum products referred to in the present complaint, and perforce therefore, the cost thereof.

Hawaii meets each of the two primary requirements for a valid *parens patriae* cause of action and may maintain this suit as *parens patriae*, acting on behalf of her citizens.[9]

There is no merit in defendants' claim that there can never be a *parens patriae* suit for damages; that such a suit lies only in equity and only for preventive relief. *Georgia v. Pennsylvania R. Co., supra, unequivocally* determines that Georgia was [and ergo Hawaii is] "a 'person' entitled to enforce the civil sanctions of the anti-trust laws." (324 U.S. at 452) The civil sanctions of the antitrust laws certainly include recovery of damages from violators thereof. As indicated earlier, the Court in denying Georgia the right to recover damages from the railroad, did so only because of the prior ruling of the Court in *Keogh v. Chicago N.W.R. Co., supra,* note 6. *Keogh* was also a suit for damages under Section 7 of the Sherman Act, 26 Stat. 210, wherein the Court determined that even though a rate-making conspiracy may have existed between the defendant railroads, neverthe-

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[9]*Georgia v. Tennessee Cooper Co., supra; Missouri v. Illinois, supra; Pennsylvania v. West Virginia, supra.*

less, for the purpose of a suit for damages, a rate, fixed by the Commission, until suspended or set aside, was for all purposes the legal rate as between shipper and carrier, and denied Keogh's antitrust action. Absent the impact of the *Keogh* decision, the only rational inference to be drawn from *Georgia v. Pennsylvania R. Co.*, is that an antitrust suit for treble damages was properly pled by Georgia in its *parens patriae* capacity. Certainly the broad objectives of the antitrust statutes are not to be meanly or narrowly curtailed because it is a state that brings a damage claim thereunder, in a *parens patriae* capacity.

Although defendants urge that Count II "does not in fact allege any injury to the general economy of the State of Hawaii", this conclusatory argument is nullified by subparagraphs (c), (d), (e), (f) and (g) of paragraph 20 of plaintiff's complaint.[10] (See page 2, *supra.*)

Defendants additionally argue that any possible recovery by the State under a *parens patriae* theory must be apart from any recovery for an injury to the business or property of the State in its proprietary capacity. Defendants continue that the antitrust statutes allow damages to be recovered only for injury to "business or property." 15 U.S.C. § 15. Their position is that an injury to the economy of the State cannot be an injury to the State's "business or property."[11]

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[10] Allegation (a) is most ambiguous and allegation (b) becomes intelligible only if the word "affect" is construed to mean "offset". See plaintiff's Count II, *supra.*

[11] Defendants cite *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 732 (8 Cir. 1964), as authority for the statement that the damage or injuries must be something different from that

U.S. v. Addyston Pipe and Steel, 85 Fed. 271 (1898), long ago said that a public body is injured in its "property" when it is forced to pay more for a commodity than it would absent a conspiracy. If the economy of a state can be injured, then that economy is finite and can fall within a definition of the word "property", even though it does not fall within the normal, simple definition of "business and property" under Section 4 of the Clayton Act. As indicated above, *Georgia v. Pennsylvania R. Co.*, lays at rest defendants' semantic argument. It clearly there differentiated between suits for damages in the State's proprietary capacity and suits for damages in its quasi-sovereign capacity and held that damages to the State's economy, if proved, were recoverable as a distinct injury, severable from whatever injury it might suffer in its proprietary capacity.[12]

There can be no risk of double recovery from the plaintiff for any single damage. As previously stated, a *parens patriae* action cannot be brought to recover the individual damages of the State's inhabitants. If the State cannot prove injury to the State's economy—an injury completely severable from the injuries to its individual inhabitants, then of course it could recover no money damages. On this point, as well as in defendants' claim that an injury to the State's economy is of a nature too remote or speculative to be measurable in money

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sustained by the community or general public. The words are convenient for defendants' argument, but the facts of that case have no application to the *parens patriae* problem before the court.

[12] "But Georgia is not confined to suits designed to protect only her proprietary interests," and continued, ". . . we find no indication that, when Congress fashioned those civil [antitrust] *remedies*, it restricted the States to suits to protect their proprietary interests." 324 U.S. at 447. (Emphasis added.)

damages (and cannot in any event be damages to a "state's business and property"), defendants move out of the area of pleading into the area of proof at trial. This case is at the pleading stage. Hawaii has pled a *parens patriae* cause of action that cannot be summarily dismissed. How it will prove its damage, what type of evidence will be offered, how the quantum of alleged damage is to be measured, are problems to be met *in futuro*, problems that will be dealt with at the proper time in the light of *Southern Photo Materials, Story Parchment Co., Bigelow*, and *Continental Ore*.[13]

Defendants' motion to dismiss Count II is Denied.
Dated: Honolulu, Hawaii, this 1st day of July, 1969.

/s/ Martin Pence,
United States District Judge

[13] *Eastman Kodak v. Southern Photo Materials*, 273 U.S. 359 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251 (1946); *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

Appendix II

In the United States Court of Appeals
for the Ninth Circuit

No. 24,603

State of Hawaii,
Plaintiff-Appellee,
vs.
Standard Oil Company of California, Union Oil Company of. California, Shell Oil Company, and Chevron Asphalt Company,
Defendants-Appellants.

[September 25, 1970]

On Appeal from the United States District Court
for the District of Hawaii

Before: MERRILL, WRIGHT and TRASK, Circuit Judges

MERRILL, Circuit Judge

This appeal presents the question whether a state can, under §4 of the Clayton Act, 15 U.S.C. §15,[1] maintain a

[1] "§15. *Suits by persons injured; amount of recovery.*
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

suit for treble damages as *parens patriae* for injury done to the general economy of the state. We hold it cannot.

The amended complaint filed by the State of Hawaii alleges that appellants conspired to fix and maintain unreasonably high prices for motor gasoline and asphalt in Hawaii. Count I alleges losses suffered by the state in its proprietary capacity. Count II, with which we are concerned, alleges:

> "The State of Hawaii • • • brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged."

The complaint then continues:

> "The unlawful contracts • • • have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:
>
> • • • • •"

Then are listed the seven specifications of injury set forth in the margin.[2]

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[2] "(a) revenues of its citizens have been wrongfully extracted from [the economy of] the State of Hawaii;
(b) taxes affecting the citizens and commercial entities have been increased to [offset] such losses of revenues and income;
(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
(d) the full and complete utilization of the natural wealth of the State has been prevented;
(e) the high cost of manufaucture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;
(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

The prayer is for injunction and for treble damages under §4 of the Clayton Act. Respecting damages under Count II, the complaint alleges:

> "Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when such amount has been ascertained, plaintiff will ask leave of court to insert said sum herein."

Appellants moved to dismiss Count II on the ground that it failed to state a claim. The motion was denied.[3] The opinion of the court in support of its order appears at 301 F.Supp. 982 (D.C. Hawaii 1969). This appeal is taken from the court's order pursuant to 28 U.S.C. §1292(b).

Appellants attack Count II on many grounds. They contend that *parens patriae* suits will not lie to recover money damages. They contend that injury to the general economy of a state is not susceptible of computation or of proof, and that allegations of such injury should not be recognized as presenting a justiciable case or controversy. The basis of our disposition of the case makes it unnecessary to reach these issues. We hold only that damages for injury done to the general economy of a state are not recoverable by the state under §4 of the Clayton Act.

(g) the Hawaii economy has been held in a state of arrested development."

(The bracketed language is included in response to Hawaii's assertion that it serves to correct typographical error in the complaint as filed.)

[3]The complaint, in a third count, attempted to state a class action claim under Rule 23, Fed.R.Civ.P., on behalf of the state and all citizens who have purchased products from appellants. This count was dismissed by the court and no appeal has been taken from that order.

Hawaii relies (as did the District Court) on *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). Georgia, invoking the original jurisdiction of the Supreme Court (Art. III, §2 of the Constitution), there sought leave to file a complaint against twenty railroad companies charging a conspiracy to fix arbitrary and noncompetitive freight rates to and from Georgia so as to prefer the ports of other states over those of Georgia. The nature of the injury allegedly suffered by Georgia is similar to that here alleged by Hawaii (see footnote 2).

Leave was granted. The Court stated:

> "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected." 324 U.S. at 451.

And:

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. * * * Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts." 324 U.S. at 447.

As the Court made clear, however, it was concerned with the relief offered by §16 of the Clayton Act.

> "Sec. 16 of the Clayton Act provides for relief by injunction 'when and under the same conditions and principles as injunctive relief against the threatened conduct that will cause loss or damage is granted by courts of equity.' Those requirements are sufficiently satisfied to justify a filing of this bill. It must be remembered that this is a suit to dissolve an illegal combination or to confine it to the legitimate area of collaboration." 324 U.S. at 460.

And:

> "Dissolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here." 324 U.S. at 462.[4]

Section 16, 15 U.S.C. §26,[5] is far broader than §4. Any person may secure injunctive relief against threatened loss or damage by violation of the antitrust laws. Section 4 provides for recovery of treble damages only by a person injured in his business or property by such a violation.

Hawaii's claim does not constitute an effort to prevent unjust enrichment by the wrongdoers through recovery by the state, for the affected consumers or for itself, of the total of direct injuries suffered by persons who

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[4]Thus the Court in *Georgia* did not specifically rule on the question whether damages are recoverable in *parens patriae* suits. As we have noted, we do not reach that question here.

[5]Section 16 provides in part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings * * *."

are unable to seek recovery for themselves.[6] Hawaii's claim is over and above all such recovery by persons, or on behalf of classes, and is asserted to have independent existence quite apart from such direct injuries. In light of Hawaii's inability yet to articulate a more precise theory or measure of such damages, we are skeptical of the existence of an independent harm to the general economy. The general economy is an abstraction. It has no value in itself, save as it may (in a representational capacity on behalf of business and property generally) serve to confer value on the specific items of business or property it affects. It exists only as a reflection of the business or property values it represents.

Nevertheless, assuming *arguendo* that the general economy can suffer injury from antitrust violations independent of the injuries suffered by private persons or by the state in its proprietary role, we hold upon two closely related grounds that Hawaii's claim for money damages does not fall within §4.

1. An injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary capacity, engage in business. For injury suffered in these respects a state can recover under §4. *Georgia v. Evans*, 316 U.S. 159 (1942). Such was the basis for Hawaii's Count I. But the terms "business or property" are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community. *E.g., Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); *Duff v. Kansas City Star Co.*, 299 F.2d 320 (8th Cir.

[6] As noted (footnote 3, *supra*), Hawaii's class action was dismissed and is not before us.

1962); *Roseland v. Pfister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942). Unless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly.

2. Accepting that the general economy can suffer injury from antitrust violations, such injury is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection. It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955). Accordingly, it has been held that shareholders, *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958); lessors, *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); creditors, *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910); patent owners suing for loss of royalties, *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955); and others of like remoteness lack standing to obtain damages under the antitrust laws.

The attenuated injuries alleged by Hawaii fall far outside the area of directness contemplated by the Clayton Act. Compensation of the public (let alone treble damages) for injury of such an extraordinary character presents policy questions which, in our view, should be subjected to close Congressional inquiry and study. We do not believe that §4 as it now stands can be construed to make such recovery available.

Reversed and remanded with instructions that Count II of Hawaii's amended complaint be dismissed.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 4 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1060~~ 70-49

STATE OF HAWAII,
Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
UNION OIL COMPANY OF CALIFORNIA,
SHELL OIL COMPANY
and CHEVRON ASPHALT COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MISCELLANEOUS

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Georgia Amended Bill of Complaint 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1060

STATE OF HAWAII,

Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
UNION OIL COMPANY OF CALIFORNIA,
SHELL OIL COMPANY
and CHEVRON ASPHALT COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. pp. xiv-xx[1]) is reported at 431 F.2d 1282. The opinion of the district court (Pet. App. pp. i-xiii) is reported at 301 F.Supp. 982.

STATUTE INVOLVED

Section 4 of the Clayton Act (15 U.S.C. § 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or

1. "Pet. App." herein refers to the appendix to the petition for a writ of certiorari.

has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

QUESTION PRESENTED

This is a suit in three counts by the State of Hawaii to recover treble damages from respondents under section 4 of the Clayton Act for alleged violation of the Sherman Act. In Count One, the state seeks to recover treble damages for injury it alleges it has suffered in its proprietary capacity as a purchaser of refined petroleum products. Count Two purports to allege an additional cause of action for damages—an action to recover treble damages for alleged injury to the general "economy and prosperity" of the state. Count Three purports to plead a class action for treble damages with the state as the representative of a single class composed of every purchaser of refined petroleum products in Hawaii. On interlocutory appeal, the court below directed dismissal of Count Two.

The question presented is whether, in addition to the right of a state to recover treble damages under section 4 of the Clayton Act for any injury to its business or property, and in addition to the right of its citizens, individually or in an appropriate class action, to recover treble damages for any injury they have sustained to their business or property, a state may also sue to recover treble damages for alleged injury to the general "economy and prosperity" of the state.

STATEMENT OF THE CASE

This is an action by the State of Hawaii against respondents for treble damages under section 4 of the Clayton Act and for an injunction under section 16 of that Act. Count One of the Fourth Amended Complaint is the whole of the original complaint.[2] It alleges that respondents conspired to fix prices for refined petroleum products in Hawaii, to the damage of the state in its proprietary capacity as a purchaser of such products (1 R. 50).

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2. Apart from an abandoned Robinson-Patman count

Count Two, first added in a Second Amended Complaint, repeats the allegations as to conspiracy and purports to allege a cause of action for injury to the general "economy and prosperity" of the state:

> "19. The State of Hawaii * * * brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.
>
> "20. The unlawful contracts * * * have injured and adversely affected the economy and prosperity of the State of Hawaii * * * *" (1 R.50-51)[3]

Count Three purports to allege a class action, the class pleaded including every Hawaiian citizen who purchased refined petroleum products.

Respondents moved to dismiss the *parens patriae* count on the ground that it failed to state a claim upon which relief could be granted, and moved to dismiss the class action on the ground, among others, that a class composed of all of the citizens of the state who purchased refined petroleum products is not a proper class under Rule 23 (Fed. Rules Civ. Proc.).

The district court granted the motion to dismiss the class action without prejudice, but declined to dismiss the *parens patriae* count. In ruling on the *parens patriae* count, the court recognized that under the decisions of this Court:

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3. The economy and prosperity of the state are alleged to have been adversely affected as follows:

> "(a) revenues of its citizens have been wrongfully extracted from [the economy of] the State of Hawaii;
>
> "(b) taxes affecting the citizens and commercial entities have been increased to [offset] such losses of revenues and income;
>
> "(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
>
> "(d) the full and complete utilization of the natural wealth of the State has been prevented;
>
> "(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;
>
> "(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;
>
> "(g) the Hawaii economy has been held in a state of arrested development."

"* * * the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The two *theories for recovery* of damages are separate and distinct" (Pet. App. p. viii).

But it held:

"While a state may not sue, *parens patriae*, for the recovery of possible individual damages or claims of its inhabitants, nevertheless if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity" (Pet. App. p. ix).

On motion of respondents under 28 U.S.C. § 1292(b) the district court certified for interlocutory appeal its ruling sustaining the *parens patriae* count (1 R.68). The court of appeals reversed the decision of the district court. The court noted that no question concerning the class action was before it.[4] It emphasized that Hawaii's claim under Count Two was for alleged injury to the general economy and prosperity of the state as a politically organized community, which, Hawaii asserted, had an existence independent of any injury to the state in its proprietary capacity, or to its citizens individually or in the aggregate:

"Hawaii's claim does not constitute an effort to prevent unjust enrichment by the wrongdoers through recovery by the state, for the affected consumers or for itself, of the total of direct injuries suffered by persons who are unable to seek recovery for themselves. Hawaii's claim is over and above all such recovery by persons, or on behalf of classes, and is asserted to have independent existence quite apart from such direct injuries" (Pet. App. pp. xviii-xix).

With respect to such a claim the court pointed out that "the general economy is an abstraction," and expressed doubt that "an

4. Petitioner declined to appeal the ruling on class action, although invited by the district court to do so (infra, p. 9, n. 9).

independent harm to the general economy" could exist. However, "assuming *arguendo* that the general economy can suffer injury from antitrust violations independent of the injuries suffered by private persons or by the state in its proprietary role," it held that Hawaii's claim for damages was clearly outside the scope of section 4 of the Clayton Act for either of two reasons: (1) An injury to the general economy of the state, separate and apart from an injury to the state in its proprietary capacity, is not an injury to the "business or property" of the state; and (2) in any event, such an injury would be so remote, indirect and consequential as to fall outside the area of direct injury contemplated by the Clayton Act (Pet. App. pp. xix-xx).

ARGUMENT

There is no conflict of decisions. The decision of the court of appeals is correct.

1. There is no right of action under the antitrust laws except as "a federal statute has created that right" (*Nashville Milk Company v. Carnation Company* (7 Cir. 1956) 238 F.2d 86, 88, aff'd, (1958) 355 U.S. 373). The rights and remedies of one seeking treble damages under the antitrust laws arise exclusively from section 4 of the Clayton Act (15 U.S.C. § 15; *Vance v. Safeway Stores* (D.N.M. 1956) 137 F.Supp. 841, 845-46, aff'd, as to this point (1958) 355 U.S. 389). Section 4 of the Clayton Act (formerly section 7 of the Sherman Act) provides:

> "Any person who shall be injured *in his business or property* by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *" (emphasis added).

Thus the cause of action provided by the Clayton Act is for treble damages for "any person who shall be injured in his business or property." It does not provide a cause of action for treble damages for "injury and adverse effect" upon the "economy and prosperity" of a state in its sovereign capacity.

In *Georgia v. Evans* (1942) 316 U.S. 159, this Court held that a state is a "person" within the meaning of section 4 of the Clay-

ton Act and could bring an action under that section for treble damages suffered in its proprietary capacity as a purchaser of asphalt for use in the construction of public roads. In so ruling, this Court construed section 4 to give to a state the same "remedy of treble damages which is available to other purchasers who suffer through violation of the Act" (316 U.S. 162):

> "The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act" (316 U.S. 162).

The right of a state to sue for treble damages under the anti-trust laws—the same right which is available to all other persons and which was sustained by this Court in *Georgia v. Evans*—is the right which is pleaded in the case at bar in Count One of the complaint. Under that count Hawaii may obtain an injunction and may also recover treble damages for any injury to its "business or property," as can each of its citizens, individually or in appropriate class actions, for any injury to his business or property. But these two categories comprise all of the damages resulting from injury to the business or property of anyone—the state and all its citizens. A separate and additional injury to the nebulous concept of the "general economy," or "general welfare," or "general prosperity" of the state in its sovereign capacity is not comprehended within the language of section 4 of the Clayton Act.[5]

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5. Nor could damages for such an injury meet the test laid down in *Keogh v. C. & N.W. Ry. Co.* (1922) 260 U.S. 156, 165, where this Court, speaking through Mr. Justice Brandeis, said:

> "* * * recovery [of damages under the Clayton Act] cannot be had unless it is shown that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable."

As the court below held, the terms "business" or "property" in section 4 of the Clayton Act are to be construed in their ordinary sense:

> "An injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary capacity, engage in business. For injury suffered in these respects a state can recover under § 4. *Georgia v. Evans*, 316 U.S. 159 (1942). Such was the basis for Hawaii's Count I. But the terms 'business or property' are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community." (Pet. App. p. xix)[6]

2. The second ground of decision by the court of appeals is also in accordance with an unbroken line of authorities under section 4 of the Clayton Act. As stated by the court:

> "Accepting that the general economy can suffer injury from antitrust violations, such injury is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection." * * *
>
> "The attenuated injuries alleged by Hawaii fall far outside the area of directness contemplated by the Clayton Act" (Pet. App. p. xx).

Petitioner argues that the foregoing ruling fails to recognize a more recent line of cases which have liberally interpreted the foreseeability test under section 4 of the Clayton Act (Pet. 42). But as the court below pointed out, an injury to the general "economy and prosperity" of a state as a socially organized entity—in its sovereign capacity—"is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection" (Pet. App. p. xx). This ruling is in accord with numerous

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6. In addition to the authorities cited by the court (Pet. App. pp. xix-xx), see:
Triangle Conduit & Cable Co. v. National El. Prod. Corp. (3d Cir. 1945) 152 F.2d 398, 399-400;
Peller v. International Boxing Club (7th Cir. 1955) 227 F.2d 593, 595-596; and
Image and Sound Service Corp. v. Altec Service Corp. (D.Mass. 1956) 148 F.Supp. 237, 239.

authorities.[7] The authorities cited by petitioner (Pet. 41-47) are not to the contrary. Indeed, they support the decision below.

3. The real basis of petitioner's prayer for a writ is the contention that this Court should allow the *parens pattiae* action because "By dismissing the class action (Count Three), it may be reasonably inferred that the [district] Court recognized that each of [Hawaii's] citizens had no practical or effective individual remedy in their own right" (Pet. 10), and that, therefore, unless the state is allowed to sue for damages, respondents will be permitted to retain their "illegal profits."[8]

The first and complete answer is that this contention is directly contrary to the language of the Clayton Act. Section 4 provides:

> "Any person who shall be injured in *his* business or property * * * may sue therefor * * * and shall recover threefold the damages by *him* sustained * * *" (emphasis added).

Section 4 does not provide a cause of action for a state to recover damages suffered by persons other than itself, any more than it allows any other plaintiff to recover damages suffered by another. Petitioner simply asks this Court to amend the antitrust laws. As this Court remarked in another connection "The argument is misaddressed. It would be within the proprieties if addressed to Congress" (*Lauritzen v. Larsen* (1953) 345 U.S. 571, 593). The court below emphasized the same consideration in ruling on Hawaii's claim for damages for injury to its general "economy and prosperity" (Pet. App. p. xx):

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7. In addition to the authorities cited by the court below (Pet. App. p. xx), see:

Conference of Studio Unions v. Loew's Inc. (9th Cir. 1951) 193 F.2d 51, certiorari denied (1952) 342 U.S. 919;

Twentieth Century Fox Film Corporation v. Goldwyn (9th Cir. 1964) 328 F.2d 190, 220, certiorari denied 379 U.S. 880; and

Sanitary Milk Producers v. Bergjans Farm Dairy, Inc. (8th Cir. 1966) 368 F.2d 679, 688-89.

8. This argument is rephrased and repeated throughout the petition. See, for example, pages 5, 15, 16, 17, 23, 27, 28, 48 and 51.

"Compensation of the public (let alone treble damages) for injury of such an extraordinary character presents policy questions which, in our view, should be subjected to close Congressional inquiry and study."

But beyond this, petitioner's argument has no support in the record in this case. The class action which petitioner pleaded in Count Three named as a single class every purchaser of refined petroleum products in Hawaii. Such a "class" would include virtually every citizen of Hawaii. It would be unmanageable, as the district court held, and would also fail to comply with Rule 23 in other material respects. For example, it would include members with directly conflicting claims such as consumers who purchased at the allegedly fixed prices and retailers who allegedly participated in the conspiracy to fix these same prices. However, there is nothing in the district court's opinions or orders which holds that there can be no proper class action or actions. The action of the district court in dismissing the class action was without prejudice:

"* * * I would hold that, under the circumstances right now, the class action based upon the injury to every individual purchaser of gasoline in the State, to me at the present time, in the context of the pleadings, would be unmanageable.

"I'm not prepared at this time to go ahead with the class action as counsel has pled it because I feel that it would be unmanageable under the present context of the case.

"The motion to dismiss Count III is granted, without prejudice, however. If you can come up sometime later with something that the Court feels that the Court can manage, we'll reconsider it" (3 R.155).[9]

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9. The district court offered to certify its ruling on the class action along with its companion ruling on the *parens patriae* count. Petitioner declined:
"THE COURT: * * * the motion for certification under * * * section [1292(b)] for a *parens patriae* count is * * * granted. Counsel will prepare the necessary orders and I'll sign the same. "Now, do you want certification of your class action?
[Counsel for Hawaii]: "No, your Honor" (3 R. 156).

Arguments similar to those made by petitioner were considered and rejected by Chief Judge Lord in *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D.Pa. 1969) 309 F.Supp. 1057, appeal dismissed, Nos. 18, 384-85 (3d Cir. Feb. 2, 1970), where the court held that *parens patriae* suits by the states of California and Kansas would not lie to recover damages under the Clayton Act for injuries allegedly sustained by the citizens of those states:

> "But plaintiffs contend that if this Court denies them the right to amend their complaints so as to assert [*parens patriae*] claims to recover damages on behalf of individual citizen-consumers, those citizens with small stakes in this massive litigation will have no adequate remedy to vindicate their rights against defendants. * * * For they contend that the individual citizens cannot as a practical matter sue for themselves or get an adequate remedy in situations like those of the present cases.
>
> "The Court cannot accept plaintiffs' argument. In the 113 cases now before this Court for pretrial proceedings, there are numerous cases in which various plaintiffs claim the right to represent as classes under Rule 23 individual homeowners, owners of apartment houses, owners of commercial buildings and others at the consumer-level alleged to have sustained injury. * * * Rather than provide a remedy to small-stake consumers allegedly denied by reasons of practicality the opportunity to bring actions available to other class action plaintiffs, allowance of the proposed claims would simply permit circumvention of the restrictions to which other class action plaintiffs are subject" (309 F.Supp. 1062).

4. Petitioner also contends that the decision of this Court in *Georgia v. Pennsylvania R. Co.* (1945) 324 U.S. 439, supports its alleged cause of action as *parens patriae* for treble damages. However, as the court below noted, the *Georgia* case decided only the question of the right of the state, as a quasi-sovereign, to sue for and obtain an injunction under section 16 of the Clayton Act.

In its bill of complaint in the *Georgia* case, Georgia pleaded one count as a proprietor, but in the counts in which it sued *parens patriae*—as a quasi-sovereign—it did not seek to recover treble

damages under the Clayton Act. Instead, as a quasi-sovereign, it merely sought "token damages" for the injuries it alleged its general economy and prosperity had suffered, conceding that actual damages were impossible to compute:

> "It is likewise impossible accurately to calculate the damage done to the people of Georgia over the decades as an organized community as a direct result of the acts of the defendants complained of herein. * * * It is respectfully requested that the Court award the State of Georgia token damages as a representative of the people—as a quasi-sovereign—in an amount which the State of Georgia submits should not be less than five million dollars" (Count Two of Georgia's amended bill of complaint).

In its brief in this Court, Georgia conceded that damage to the state as a sovereign or quasi-sovereign "transcends measurement in pecuniary terms" and is "perhaps incapable of estimate in money," and the state waived all claims to damages other than "token or nominal" (Brief on Behalf of the State of Georgia on Motion to File Amended Bill of Complaint, pp. 7, 29).

This Court said:

> "Georgia sues in four capacities, only two of which we need mention: (1) in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them; and (2) in her capacity as a proprietor to redress wrongs suffered by the State as the owner of a railroad and as the owner and operator of various institutions of the State" (324 U.S. 443).

This Court then held that its prior decision in *Keogh v. C. & N. W. Ry. Co.* (1922) 260 U.S. 156, was alone a barrier to recovery of any damages. It pointed out, however, that this "does not dispose of the main prayer of the bill, stressed at the argument, which asks for relief by way of injunction" (324 U.S. 453), and went on to consider whether the state, in her capacity as a quasi-sovereign, had standing to sue for *injunctive relief* against the "continuing wrong" of the alleged conspiracy.

Chief Judge Lord, in his opinion in the *Philadelphia Housing Authority* case (p. 10, supra), correctly observes that no issue with

respect to the right of a state in its sovereign or quasi-sovereign capacity to recover treble damages under the Clayton Act was before this Court in the *Georgia* case:

> "Nor does the *Georgia* case, supra, itself lend any support to the type of damage claim for which leave to amend is here sought. In fact, in the only 'parens patriae' claim considered by the Court in its opinion, that set forth in Count 2 of Georgia's complaint, Georgia did not even seek damages on behalf of individual citizens, nor for that matter treble damages under the antitrust laws at all, though it did seek treble damages in its proprietary capacity under Count 3 of its complaint. For in its prayer for relief set forth at pages 24-27 of its complaint, Georgia requested as damages under Count 2, that it be awarded 'token' damages in the amount of five million dollars as a representative of the public as damages for harm and injury to the economy of the state as a whole" (309 F.Supp. 1061-62).

Notwithstanding the foregoing, petitioner seeks to read into the passing use by this Court of two plural nouns in its opinion in the *Georgia* case a "holding" that a state may sue to recover treble damages under section 4 of the Clayton Act (Pet. 30-31). It refers to the following two passages, in which this Court, in sustaining the right of Georgia to sue for an injunction, said:

> "But when it came to other [than criminal] *sanctions* Congress followed a different course and authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil *remedies*, it restricted the States to suits to protect their proprietary interests" (324 U.S. 447) (emphasis added).
>
> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil *sanctions* of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action [for an injunction] to this Court fail" (324 U.S. 452) (emphasis added).

Two plural nouns, used incidentally in the course of an opinion, do not, of course, support the "holding" petitioner purports to

find in *Georgia*. It is settled that "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents" (*Webster v. Fall* (1925) 266 U.S. 507, 511).[10] In *Georgia*, the question whether a state, suing in its quasi-sovereign capacity, may recover treble damages under the Clayton Act for an alleged injury to its general "economy and prosperity" did not even "lurk" in the record. No such claim was pleaded, considered by the Court or anywhere mentioned.[11]

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10. See also *Nashville Milk Co. v. Carnation Co.* (1958) 355 U.S. 373, 376, n. 5; and see the dissenting opinion (355 U.S. 383).

11. The Special Master in *Georgia* (Lloyd K. Garrison) found that the evidence failed to support the allegations that Georgia had been the victim of a conspiracy directed against it *as a state*, and that, in consequence, the state had no standing to sue *parens patriae*. Of this case Professor Freund has since remarked:

> "Whatever strategic end may have been achieved through the earlier overruling of a motion to dismiss * * * the complete inability of the state to make good its claim of injury as *parens patriae* suggests that in the future the Court may be more wary of sweeping allegations of detriment to a state's economy as a basis of a case or controversy" (Freund, Book Review (1951) 3 J.Leg.Ed. 643, 644, n. 2).

If Hawaii were allowed to maintain its *parens patriae* count, Professor Freund's comments would again be appropriate. As Hawaii's Department of Planning and Economic Development recently noted:

> "Dramatic as the [United States'] economic expansion has been [since February 1962—the low point of the last recession], Hawaii's has been more dramatic. Further, this expansion has been shared in some degree by all sectors of Hawaii's economy" (Dept. of Planning and Economic Development of the State of Hawaii (1969) The Economy of Hawaii 3).

Assuming the high cost of living allegedly shown by petitioner's off-the-record chart (Pet. 39), Hawaii provides another instance of the familiar observation that inflation is often accompanied by increased economic activity. Perhaps this is why the court of appeals was "skeptical of the existence of an independent harm to the general economy" of Hawaii (Pet. App. p. xix).

The *Georgia* case was dismissed *per curiam* by consent of all parties after the master's report was filed ((1950) 339 U.S. 975) but before it was considered by this Court ((1950) 340 U.S. 889). In the meantime Congress had passed the Bulwinkle Act ((1948) 62 Stat. 472) authorizing the Interstate Commerce Commission to approve and immunize from the antitrust laws combinations of the character complained of in the case.

The district court acknowledged that never before had a *parens patriae* suit for damages been permitted, unless *Georgia* itself could be so characterized (Pet.App. p. v.). However, this Court was quite explicit in stating, in the *Georgia* case, the rationale of its decision, for it said:

> "Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits [i.e., those long recognized] should be excluded from the purview of the antitrust acts" (324 U.S. 447).

The "long recognized" suits *parens patriae* have been exclusively for equitable relief, not for damages. Moreover, in *Georgia* the Court did not hold that the *parens patriae* doctrine expanded Clayton Act suits beyond the limits of the Act itself, and section 4 of the Clayton Act limits the remedy of damages to one who has been injured "in his business or property".

5. As a final point, petitioner (Pet. 48-52) seeks to revive a proposition which was made to and rejected by the district court and which was not before the court below. Indeed, it is directly contrary to the theory petitioner argued to that court. The proposition is that, even though a state may have no right to sue for treble damages under the Clayton Act for an alleged injury to its general economy, it should be permitted to sue, *parens patriae*, to recover treble the damages its citizens may have suffered. The contention was rejected by the district court on the authority of numerous decisions by this Court holding that a state has no standing to sue *parens patriae* for the benefit of particular individuals or for injuries sustained by its citizens for which they may sue in their own behalf.[12] The decision of the district court on

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12. *Oklahoma v. A., T. & Santa Fe Ry.* (1911) 220 U.S. 277;
Oklahoma v. Cook (1938) 304 U.S. 387;
North Dakota v. Minnesota (1923) 263 U.S. 365;
Louisiana v. Texas (1900) 176 U.S. 1; and
N.H. v. Louisiana: N.Y. v. Louisiana (1883) 108 U.S. 76.

For a discussion of the principles relating to the standing of a state to sue *parens patriae*, see Malina and Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193 (1970).

this point is in accord with the decision in *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D.Pa. 1969) 309 F.Supp. 1057, referred to above (pp. 10, 12). Petitioner's contention is, moreover, directly contrary to the specific language of section 4 of the Clayton Act (see p. 8, supra).

CONCLUSION

There is no conflict of decisions. The opinion of the court below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

October Term, 1970

No. 1060

State of Hawaii,
Petitioner,
vs.
Standard Oil Company of California, Union Oil Company of California, Shell Oil Company and Chevron Asphalt Company,
Respondents.

PETITIONER'S REPLY BRIEF

I. THE STATE OF HAWAII, AS PARENS PATRIAE, DOES POSSESS STANDING UNDER SECTION 4 OF THE CLAYTON ACT.

The respondents' Brief in Opposition to the present petition for writ of certiorari attempts, in an overly-simplified manner, to sweep away and bury the significant issues raised by the Ninth Circuit's decision in our

present case. An example of the confusion is illustrated in the respondents' statement of the "Question Presented" as follows:

> "... whether, *in addition* to the right of state to recover treble damages ... for any injury to its business or property, and *in addition* to the right of citizens ... to [so] recover ..., a *state may also sue to recover* treble damages for alleged injury to the general economy and prosperity of the state." (Brief for Respondents in Opposition, p. 2.) (Emphasis added.)

In fact, the primary issue herein is whether, under *Georgia v. Pennsylvania Ry. Co.*, 324 U.S. 439 (1945), the injury suffered by State of Hawaii as *parens patriae* as a result of respondents' price fixing conspiray was an injury to its business or property within the meaning of Section 4 of the Clayton Act.

Respondents further over-simplify the thrust of petitioner's argument as one which urges this Court to recognize the standing of the State of Hawaii herein to seek damages in order to prevent respondents from retaining their "illegal profits" derived from their antitrust violation. (Brief for Respondents in Opposition, p. 8.) Respondents assert that such an argument should be addressed to Congress, not the Courts. (Brief, pp. 8-9.)

Respondents thus ignore that this Court's decision in *Georgia v. Pennsylvania Ry. Co., supra,* established that an antitrust injury to the State is an injury which has been recognized by the law, and is one which Congress intended to remedy under the "purview" of existing "antitrust acts". 324 U.S. at p. 447. Thus, an injury to

the economy and prosperity of the State of Hawaii in its *parens patriae* capacity is "property" (i.e., "an interest which the law protects") within the meaning of Section 4 of the Clayton Act. See *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

Respondents readily admit, as they must, the propriety of suits *parens patriae* for equitable relief. (Brief, p. 14.) However, they totally ignore the historical parallelism as to the interests protected by Section 4 (treble-damage remedy) and Section 16 (injunctive relief) of the Clayton Act. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-133 (1969). It is anomalous to contend that an antitrust violation of the nature alleged herein, causes legal injury sufficient to accord the State standing as *parens patriae* to seek an injunction under Section 16, but not sufficient to accord standing to obtain damages for the legal injury suffered under Section 4. If there is an antitrust injury to a legally protected interest (i.e., "property") of the plaintiff, then that plaintiff may seek *all* available "remedies" and marshall all statutory "sanctions" under the federal "antitrust acts." 324 U.S. at p. 447.

The only exceptions to the above are found in those rare cases (such as *Georgia v. Pennsylvania Ry. Co.* itself) where a supervening federal policy (e.g., prohibition of rebates in the transportation industry) militates against the award of such damages. In all other instances, including our present case, the policy of the law strongly favors the availability of private damage actions as an important component in the vigilant enforcement of na-

tional antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). What countervailing policy warrants the restriction of the damage action in the present case, merely because the petitioner's legally protected property interest is not tangible property which can be seen with the naked eye? It is clear that the respondents' conduct is of the type that the antitrust laws seek to prohibit, and the interest of petitioner is "... within the zone of interests to be protected by ..." such laws. See *Association of Data Processing Service Organizations, Inc. v. Camp*, ____ U.S. ____, 90 S. Ct. 827, 830 (1970).

As this Court has stated on numerous occasions, in order to prevail under the Clayton Act, plaintiff need only prove a violation of the antitrust laws and resultant damage. *Radiant Burners v. People's Gas & Light Co.*, 364 U.S. 656, 660 (1961); *Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 697 (1962); *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969).

In our present case, petitioner, the State of Hawaii, has alleged that respondents conspired to fix prices, which is a clear violation of Section 1 of the Sherman Act. Petitioner has also alleged that, as *parens patriae*, and by reason of respondents' antitrust violation, it has suffered substantial injury to interests which are protected by the "antitrust acts". The only question, then, relates to the calculation of the amount of damages. Clearly, this issue must not be decided as a matter of law. The issue of damages is for the jury and the jury

may ". . . act upon probable and inferential as well as upon direct and positive proof. . . ." "The jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly." "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946).

Modern technological and scientific advances have made it possible to determine the impact upon the economy of various anti-competitive and anti-social factors. See, for example, Isard, *et al., On the Linkage of Socio-Economic and Ecological Systems,* 21 Papers of the Regional Science Ass'n, p. 79 (1968). As one commentator has observed:

> "The mathematical skills of economists and the availability of data about the economy have increased greatly in the last twenty years. Econometricians can now make rough mathematical descriptions of the key features of even so complex a system as the United States economy, and by means of input-output analysis, they can make crude estimates of damage to a regional economic unit. These calculations may be sufficiently precise for the measurement of damages in tort litigation. Moreover, in antitrust litigation the requirements of certainty of damages are applied more liberally in favor of the plaintiff than at common law. Further, it has long been recognized that exactness in measurement of damages is not necessary; it is sufficient that a reasonable basis for computation exists." *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages,*

6 Columbia Journal of Law and Social Problems, 411, 419-420 (1970).

The same commentator, in addressing himself to our present case of alleged price-fixing in the oil industry, has articulated at least one specific way in which the antitrust violation here alleged has caused tangible economic injury to the State of Hawaii. The price increase caused by the respondents' price-fixing conspiracy could well be shown to have reduced the demand for and total consumption of motor gasoline thus directly affecting the tax revenues (assessed per gallon of gasoline sold) collected by the State of Hawaii. 6 Columbia Journal of Law and Soc. Problems at pp. 414-417. This is but one example of the type of evidence which could be presented for the jury's use in measuring the damage suffered herein by petitioner as *parens patriae*. Compare Mr. Justice Brandeis statement in *Keogh v. C. & N. W. Ry. Co.*, 260 U.S. 156, 165 (1922) cited in respondents' brief (p. 6, footnote 5).

In the final analysis, then, the standing of the State of Hawaii to maintain this present action under Section 4 of the Clayton Act is governed by the cases discussed above and summarized by this Court's observation in *Continental Ore, supra:*

> "Where plaintiff proves a loss, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that *the jury*, as the trier of the facts, *must be permitted to draw from this circumstantial evidence the* inference that the necessary causal relation exists." *Continental Ore Co. v. Union Carbide & Carbon Co., supra,* 370 U.S. at p. 697 (Emphasis added.)

The decision herein by the United States Court of Appeals for the Ninth Circuit substantially emasculates the rulings by this Court in the decisions discussed above. Thus, certiorari should be granted to clarify the present status of the law with respect to standing under Section 4 of the Clayton Act.

II. THE INJURY SUFFERED BY THE STATE OF HAWAII, AS PARENS PATRIAE, IS NOT "INDIRECT AND CONSEQUENTIAL", BUT IS ONE RECOGNIZED BY LAW FOR WHICH THE REMEDY OF DAMAGES IS APPROPRIATE AND PROPER.

Petitioner has thus far established that:

(1) The injury to the economy, prosperity and well-being of the State caused by a widespread antitrust conspiracy gives rise to a cause of action by the State as *parens patriae* (*Georgia v. Pennsylvania Ry. Co., supra.*)

(2) Under the *Georgia* case, such an injury is recognized by law and, therefore, is an injury to a "property" interest of the State within the meaning of the "antitrust acts", specifically Section 4 of the Clayton Act (*Waldron v. British Petroleum Co., supra*) as well as Section 16 (*United States v. Borden Co., supra*);

(3) The dollar amount of the injury to petitioner as *parens patriae* can be demonstrated by relevant economic data at trial and thus, the determination of such damages, if any, must be left to the jury. (*Bigelow v. RKO Radio Pictures, Inc., supra.*)

Of equal importance, all relevant policy considerations here militate in favor of allowing the *parens patriae*

damage action as the only feasible alternative to the respondents' retaining the enormous illegal profits which they have derived at the expense of the economy and consumers of the State of Hawaii, by virtue of their price-fixing conspiracy.

Decisions such as that of the Ninth Circuit in the instant case and *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1057 (E.D. Pa. 1969) (heavily relied upon by respondents in their brief herein) ignore these legal and policy considerations. Instead by narrowly reading and restrictively applying Section 4, such decisions foreclose civil antitrust actions which this Court's prior rulings would clearly allow.

Nowhere is this "anti-antitrust" attitude more clearly demonstrated than in that portion of the Ninth Circuit Court's opinion below concerning the "indirect" nature of the injury suffered by the State of Hawaii as *parens patriae*. Such concepts as "indirect" injury, "target area", "consequential" injury, "remote" injury and the like have been too frequently used by lower federal courts to restrict the availability of the treble-damage remedy to antitrust plaintiffs. It is as though these courts believe that the enforcement of the antitrust policy of the United States should be restricted rather than encouraged. These rulings have been made in the face of this Court's numerous and specific directions to the contrary. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *Radovich v. National Football League, supra*. Nevertheless, the restrictive rulings persist and antitrust enforcement suffers. (See, for example,

V.T.R. v. Goodyear Tire and Rubber Co., 303 F.Supp. 773 (S.D.N.Y. 1969); *Fields Productions, Inc. v. United Artists Corp.*, 318 F.Supp. 87 (S.D.N.Y. 1970) *affirmed*, 432 F.2d 1010 (2d Cir. 1970); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970); *SCM Corp. v. RCA*, 276 F.Supp. 373 (S.D.N.Y. 1967) *affirmed* 407 F.2d 166 (2d Cir. 1969); and, of course, the Ninth Circuit decision herein. This Court should grant certiorari in the present case in order to resolve this important question concerning the restrictive limitations which these decisions have engrafted upon the standing of antitrust plaintiffs under Section 4.

Particularly, in the instant case, this Court should reaffirm its ruling in *Georgia v. Pennsylvania Ry. Co., supra*, establishing that an injury to the economy of a State is a direct and foreseeable result of the type of anti-competitive conduct alleged against respondents herein; and, therefore, a civil action to remedy such an injury may be maintained by the State as *parens patriae* under the "antitrust acts" including Section 4 of the Clayton Act. See: *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967); *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir. 1966); *Mulvey v. Samuel Goldwyn Productions*, ... F.2d ..... (9th Cir., Oct. 20, 1970).

This Court should specifically reject the artificial limitations and "judicial glosses" which lower federal courts have engrafted upon the standing requirements of Section 4. The State of Hawaii, as *parens patriae* should be accorded standing thereunder in order to remedy the enormous economic damage which it has suffered by reason of respondents' violation of the antitrust laws.

III. THE STATE OF HAWAII, AS PARENS PATRIAE, SHOULD BE PERMITTED TO MAINTAIN THIS ACTION UNDER SECTION 4 OF THE CLAYTON ACT AS THE REPRESENTATIVE OF THE INTERESTS OF ITS CITIZENS.

Petitioner's primary theory in support of its present damage action as *parens patriae* is based on the principle that the injury to its economy is separate and apart from the individual injuries to its consumer-citizens who were, as a result of the respondents' anticompetitive conspiracy, charged excessive prices for gasoline. Independent of the above theory, however, there exists an additional and alternative basis for permitting petitioner to maintain the present action. In the words of the amended complaint: petitioner brought "... this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages. ..." (R. 50)

Notwithstanding the assertion of the respondents (Brief, p. 14), the fact that the District Court and Court of Appeals below rejected or refused to consider this theory does not remove it from the case. Petitioner urges this Court to recognize that, historically, the *parens patriae* action was appropriate in cases such as our present one where a widespread, pervasive injury adversely affected so large a portion of the State's population that individual remedies were foreclosed as impractical. In such cases the most effective remedy was recognized to be an action by the State as trustee, guardian and *parens patriae* on behalf of its citizens. And the fact that the citizens were individually injured by the wrongdoer did not preclude the standing of the State

as *parens patriae*. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *New York v. New Jersey*, 256 U.S. 298, 301-302 (1921).

Respondents in their brief (at p. 15) allude to the "specific language of Section 4" and the requirement that the injury be to the plaintiff's business or property and that plaintiff recover the damages ". . . *by him* sustained . . ." Respondents once more ignore the fact that this language must be read and construed in light of the public purposes and policies which favor a liberal interpretation of the treble-damage antitrust remedy in promoting antitrust enforcement. It must further be recognized that in the *parens patriae* context, the "people" (citizens-consumers here involved) are the state, and, as such, an injury to the business or property of a vast portion of the citizenry is an injury to the State.

A restrictive and narrow reading of Section 4, as urged by the respondents, would have precluded the result reached by this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Such narrow readings of the Act have created the chaos and limitations on the civil damage action in the various "standing" cases ("indirect" injury, "target area", etc.) Such restrictions are backward steps in our jurisprudence and, as would be the case if the Ninth Circuit Court's decision herein stands, usually result in the wrongdoers retaining the fruits of their illegal activities, 392 U.S. at p. 494. Such a result is clearly inconsistent with national antitrust policy and with our traditional notions of justice.

On the other hand, should this Court, consistently with historical precedents, construe the scope of the *parens*

patriae suit to include representation by the State of the interests of citizens and consumers, and to permit damages to be recovered, the *parens patriae* action would become the most effective and socially desirable means for remedying major antitrust violations such as the one alleged herein. *Wrongs Without Remedy,* 43 So. Cal. L. Rev. 570, 594-595 (1970).

In the final analysis, such a decision would be good law, good policy and good sense.

CONCLUSION

For the foregoing reasons, as more fully discussed in the Petition previously filed herein, the State of Hawaii respectfully requests that this Honorable Court grant the Petition for Writ of Certiorari and resolve the important issues presented therein.

Dated, January 15, 1971.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

70-49

No. ~~1060~~

STATE OF HAWAII, *Petitioner*,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1060

STATE OF HAWAII,
Petitioner,
vs.
STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS OF THE COURTS BELOW

The opinion of the District Court for the District of Hawaii is reported at 301 F. Supp. 982 (D. Haw. 1969). That decision is set forth as Appendix I to the Petition for Writ of Certiorari filed previously herein, and at page 82, *et seq.* of the single Appendix (hereinafter "App., p. ....").

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 431 F.2d 1282 (9th Cir. 1970). That decision is set forth as Appendix II to the Petition for Writ of Certiorari and at p. 100, *et seq.* of the single Appendix filed herein.

JURISDICTION

This is a civil action for injunctive relief and damages initiated by petitioner, the State of Hawaii against respondents Standard Oil Company of California, Union Oil Company of California, Shell Oil Company and Chevron Asphalt Company. The action was filed in the United States District Court for the District of Hawaii which possessed jurisdiction under 28 U.S.C. §1337 and 15 U.S.C. §§ 15, 26. In the District Court, plaintiff-petitioner sought injunctive relief and damages from respondents who were alleged to have combined and conspired to fix the prices of motor gasoline, other refined petroleum products and asphalt. The State of Hawaii sought relief for injuries it suffered in its proprietary capacity (Count One), and as *parens patriae* for injuries to the State and its economy as well as guardian, trustee, and protector of its citizens (Count Two), and also through a class action on behalf of all consumers in the State who suffered individual injury (Count Three).

Upon respondents' motion to dismiss Counts Two and Three of the complaint, the District Court sustained the right of the State to maintain its action for damages and injunctive relief as *parens patriae*, but dismissed Count Three, the class action. *State of Hawaii v. Standard Oil*

Company of California, et al., 301 F.Supp. 982 (D. Hawaii 1969) (App., p. 80).

Respondents, pursuant to 28 U.S.C. §1292(b) appealed from the order denying their motion to dismiss Count Two. On September 25, 1970, the United States Court of Appeals for the Ninth Circuit reversed the ruling of the District Court and remanded the case ". . . with instructions that Count Two of Hawaii's amended complaint be dismissed." *State of Hawaii v. Standard Oil of California, et al.*, 431 F.2d 1282 (9th Cir. 1970). (App., p. 106).

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 25, 1970 (App., p. 107). No rehearing or extension of time was either sought or granted. The petition for a Writ of Certiorari was filed on December 5, 1970, and was granted on March 1, 1971 (App., p. 108).

The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The overriding issue here involved relates to the right of the State of Hawaii to utilize the remedies provided by the federal antitrust laws in maintaining an action as *parens patriae* for injuries to the State as a result of a widespread, pervasive price-fixing conspiracy perpetrated by various major oil companies and directed against the captive market of the State of Hawaii, its economy and its consumer citizens in general. At stake is the continuing vitality of this Court's decision in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), as a

basis for the effective enforcement of the antitrust policy of the United States through civil actions initiated by the states under circumstances in which actions by private consumers are not realistically feasible or practical.

Specifically, the questions presented for review by this Court are:

I. Whether a state, as *parens patriae,* may enforce the civil sanctions of the antitrust laws and maintain an action for damages and injunctive relief against major oil companies which have combined and conspired to fix inflated prices *in that state* injuring the economy and general welfare of the state and adversely affecting a substantial portion of the citizenry who are without an otherwise effective remedy?

II. Whether the Court of Appeals erred in ruling that the State of Hawaii, as *parens patriae,* does not have standing to maintain an action under Section 4 of the Clayton Act (15 U.S.C. §15)?

III. Whether the Court of Appeals erred in its failure to recognize that, under *Georgia v. Pennsylvania Railroad Co., supra,* a comprehensive and pervasive price-fixing conspiracy, such as alleged herein, directed against the markets and consumers within the State of Hawaii could cause substantial injury to the economy and well-being of the State itself and its citizenry as a whole, and that such injuries are not so indirect as to preclude petitioner's standing to maintain the present action?

IV. Whether, in light of numerous cases such as *Bigelow v. R.K.O. Radio Pictures, Inc.,* 327 U.S. 251 (1946), the Court of Appeals erred in its remand for summary

dismissal of the *parens patriae* claim which thereby precluded plaintiff from presenting relevant economic data from which the jury could have reasonably estimated the extent of the economic injury and damages suffered as a result of the respondents' illegal and profitable price-fixing scheme?

V. Whether in its remand of the cause for summary dismissal, the Court of Appeals erred in failing to permit petitioner, in its effort to enforce the policies of the antitrust laws and prevent the unjust enrichment by the respondent-wrongdoers, to maintain the present action as *parens patriae,* trustee, guardian and protector of the citizen-consumers and recover the damages suffered by such citizens and residents of the State who are otherwise unable to seek recovery for themselves, especially in a case such as this one where the alleged wrong has also injured the economy and well-being of the State?

STATUTES INVOLVED

1. The Clayton Act, Section 4 (15 U.S.C. §15) provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. The Clayton Act, Section 16 (15 U.S.C. §26) provides:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323 §16, 38 Stat. 737."

3. The Sherman Act, Section 1 (15 U.S.C. §1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

4. The Sherman Act, Section 2 (15 U.S.C. §2) provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT

This is a civil antitrust action for treble damages and injunctive relief initiated by the petitioner, State of Hawaii against the respondents, Standard Oil Company of California (hereinafter "Standard"), Union Oil Company of California (hereinafter "Union"), Shell Oil Company (hereinafter "Shell") and Chevron Asphalt Company (hereinafter "Chevron"), pursuant to sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26). Count One of the fourth amended complaint, alleges that the respondents combined and conspired to fix and maintain unreasonably high prices for motor gasoline, asphalt and other refined petroleum products and, further, that they monopolized trade and commerce in such products in violation of Sections 1 and 2 of the Sherman Act, (15 U.S.C. §§1, 2) (R. 46-50). (App., pp. 62-63). In this respect, the State alleges that—as a purchaser of gasoline, asphalt and such other products through its departments, institutions and agencies—it was compelled to pay higher prices for these products than it would have paid in a free and competitive market. (R. 50) (App., p. 64).

Count Two of the amended complaint re-alleges the conspiracy by and between Standard, Union, Shell and Chevron and additionally alleges (R. 50-51) (App. p. 64):

"19. The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws, hereinbefore alleged. 20. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization, hereinbefore alleged, have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:

(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;[1]

(b) taxes affecting the citizens and commercial entities have been increased to affect[2] such losses of revenues and income;

(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

(d) the full and complete utilization of the natural wealth of the State has been prevented;

(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

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[1]This should read as follows: "revenues of its citizens have been wrongfully extracted from the *economy and citizens* of the State of Hawaii."

[2]This is a typographical error. The word "affect" should be "offset".

(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

(g) the Hawaii economy has been held in a state of arrested development.

21. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

In Count Two, then, the State of Hawaii asserts a claim as *parens patriae* in its ". . . capacity as a quasi-sovereign or as agent and protector of [its] people. . . ." *Georgia v. Pennsylvania R. Co., supra* at p. 443. The allegations made by the State of Hawaii in our present action parallel, to a large extent, those of the state in the *Georgia* case. The contention, essentially, is that the respondents as major producers, refiners and sellers of petroleum have combined and conspired to artificially inflate prices in this crucial industry which has resulted in a substantial injury to the economy and economic development of the State of Hawaii. Vast amounts of revenue have been extracted from the State by the respondents who are nationwide producers and sellers of petroleum products. These funds have been removed from the economy of the islands to the mainland. Hawaii has been discriminated against as a market. Moreover, the conspiracy is alleged to have diminished the revenues available to the State and otherwise frustrated and impeded the States's ability to promote the general progress and welfare of its citizens by a misallocation of the State's economic resources as a result of the price-fix here

alleged. In Count Two the State seeks damages pursuant to Section 4 of the Clayton Act (15 U.S.C. §15), in order to recover for the economic harm which the respondents have already caused by their alleged price-fixing conspiracy. Moreover, injunctive relief is sought to prevent the continuation of the economically deleterious price fixing conspiracy in the future. (R. 52-53) (App., p. 64.)

In a third count of the amended complaint, the State of Hawaii re-alleged the conspiracy and sought recovery pursuant to Rule 23 (Fed. R. Civ. Proc.) as representative of a class comprised of all purchasers (in the State) of respondents' gasoline, asphalt and/or other refined petroleum products (R. 51-53) (App., pp. 65-66.)

Respondents moved to dismiss Counts Two and Three. They argued that an action by the State as *parens patriae* would not lie to recover damages under the antitrust laws. (R. 56-57) (App., pp. 45-46, 68.) Moreover, as to Count Three, respondents challenged the class action as unmanageable. They argued that because the class involved (consumers of petroleum products) would be so large and diverse the Court should not allow the utilization of the class action remedy. (R. 38, 39) (App., p. 45-46, 68.)

The District Court agreed with respondents as to the impropriety of a class action and granted the motion to dismiss Count Three of the amended complaint. (R. 68) (App., pp. 80, 96.)

However, the District Court denied respondents' motion to dismiss Count Two of the complaint, recognizing that (R. 62) (App. p. 90.)

". . . if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity."

The District Court's decision upholding Count Two was based on an historical and analytical application of the *parens patriae* doctrine. The Court recognized that the *parens patriae* remedy is available to the State where (a) a "substantial portion of the inhabitants are adversely affected" by the allegedly wrongful acts challenged in the action (R. 61) (App., p. 89); and (b) the deleterious impact upon the general welfare of the State and its economy are separate from the economic injuries suffered by individual citizens (R. 62, 64) (App., p. 88).

The District Court sustained the State of Hawaii's *parens patriae* claim because the respondents' alleged conspiracy was so widespread as to injuriously affect hundreds of thousands of citizens of Hawaii. Thus, a justiciable issue was raised concerning the adverse impact of the illegal price-fixing conspiracy on the State's economy. (R. 62) (App., p. 93.) The dismissal of the class action (Count Three) was based upon a recognition that the individual citizen-consumers of the products involved were so numerous and diverse, and would find it so difficult to verify their purchases that a class action would be unmanageable, and that these consumers therefore have no practical or effective individual remedy in their own right (which is the historical justification for the *parens patriae* remedy). While the losses suffered by each consumer-victim, on an individual basis, was relatively

small, the cumulative effect of the alleged conspiracy was to extract millions of dollars from the Hawaii economy.

In light of these considerations and additional factors such as the size and pervasiveness of the oil industry, the impact of its products and their prices upon the economic development of any geographic area, the nature of the price-fixing conspiracy alleged herein, and the effect of that conspiracy upon hundreds of thousands of small-volume consumers, the District Court found that the *parens patriae* remedy was proper *in the present case.*

The United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court. (App., pp. 106, 107.) The Court of Appeals expressed doubt that the general economy of a state could suffer injury as the result of an antitrust violation (even a violation such as a vast price-fixing conspiracy in a major industry as alleged in this case.) (App., p. 105.) The Court of Appeals went on to rule that even if measurable financial damage to the economy of the state could be defined:

> (1) Such a loss is not an injury to the business or property of the state or its people within the meaning of Section 4 of the Clayton Act; and
>
> (2) such an injury would be so indirect, remote and attentuated as to be outside the area of the economy ("target area") endangered by the conspiracy—hence, the state had no standing to obtain damages under the antitrust laws. (App., p. 105.)

The State of Hawaii petitioned this Court for a Writ of Certiorari in order to obtain review of the decision of

the Court of Appeals. The petition for Certiorari was granted on March 1, 1971. (App., p. 106).

SUMMARY OF ARGUMENT

Petitioner, the State of Hawaii, initiated this civil antitrust case for damages and injunctive relief, seeking to remedy injuries resulting from a comprehensive price-fixing conspiracy within the oil industry. It is alleged that the respondents—major producers and sellers of petroleum—have conspired to inflate the prices of petroleum products and to fix a discriminatorily high price structure in the captive market of the Hawaiian Islands. As a result of this conspiracy, the respondents have extracted many millions of dollars in illicit profits from the economy of the State of Hawaii and its citizen-consumers. (App., pp. 65, 70.)

At stake in the present case is the right of the State as *parens patriae* to recover damages for the injury arising out of this major and pervasive antitrust violation. It is clear that no other effective remedy exists in that the individual consumers who were overcharged as a result of the conspiracy ". . . would have only a tiny stake in a lawsuit and little interest in attempting a class action." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). Moreover, at respondents' urging, the District Court below ruled that a class action on behalf of all consumers would be so unmanageable that it could not be allowed. (App. pp. 47-50, 74, 80.)

The present action by the State of Hawaii, as *parens patriae*, thus becomes the only meaningful and effective

alternative to permitting the respondents to retain *nearly all or a substantial portion* of the illicit profits which they derived from their illegal price-fixing conspiracy. The ruling of the Court of Appeals below, ordering the dismissal of petitioner's *parens patriae* claim therefore militates against the strong Congressional policy which favors the liberal availability of the civil damage remedy as a significant component in the vigilant enforcement of national economic and antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). As this Court recognized in the *Hanover Shoe* case, the consequence of the ruling of the Court of Appeals below would necessarily be that

> "*. . . those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality, because no one was available who would bring suit against them.* Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. at 494. (Emphasis added.)

In view of this Court's decision in *Georgia v. Pennsylvania R. Co., supra,* the undesirable result of permitting respondents to retain their illicit profits need not and must not occur. *Georgia* recognized the standing of a state as *parens patriae* under the antitrust laws. Georgia's request for at least five million dollars was denied by the Court solely because the case involved the transportation industry, and any recovery of damages would have constituted a "rebate" prohibited by Congressional interstate commerce policy. (See *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156.) However, this Court went on to ob-

serve that suits by states as *parens patriae* ". . . should not be excluded from the purview of the antitrust acts." Moreover, the Court recognized that a state, as *parens patriae* has standing to pursue *all* available "civil remedies" and ". . . to enforce the civil sanctions of the antitrust laws. . . ." (324 U.S. at 447, 452).

Georgia and earlier cases upon which it relies establish beyond question that an injury to a state as *parens patriae* is a serious wrong against the state itself, independent of any injury to the citizens of the state. Pervasive and comprehensive antitrust conspiracies in major industries which impose discriminatory pricing patterns in a particular state ". . . affect the prosperity and welfare of a state. . . ." Such antitrust violations impede industrial development and contribute to the economic deterioration of the community. (324 U.S. at 450-451.) The State of Hawaii, here, must be allowed, by means of recovery of damages, to redress such injuries.

The *Georgia* ruling recognizes that such economic harm constitutes a legal wrong (324 U.S. at 451) which the state, as *parens patriae,* may remedy under the antitrust laws. As such the injury is one to legally protected *property* interests within the meaning of Section 4 of the Clayton Act (15 U.S.C. §15). See *Waldron v. British Petroleum Co.*; 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

The decision of the Nnth Circuit Court of Appeals below is patently inconsistent with this Court's ruling in *Georgia.* The lower court erroneously stated that the economy of the State of Hawaii could not be injured by a major conspiracy as alleged herein. It went on to rule that even if such an injury could be shown, the loss could not be

measured in money damages. The lower court thus violated fundamental rules applicable to measurement of antitrust damages.

Under *Bigelow v. R.K.O. Radio Pictures, Inc., supra,* uncertainty concerning determination of damages must be resolved against the wrongdoers. But here, the Ninth Circuit summarily decided that—as a matter of law—petitioner (the innocent victim of the conspiracy) could not prove his damages without even affording it an opportunity to do so. The Court of Appeals' approach was clearly erroneous because, granting petitioners' standing, under *Georgia,* as *parens patriae,* there exist two alternative theories for the recovery of damages, either of which could be demonstrated before the jury by relevant economic data:

(1) The State of Hawaii could show, by statistical data and expert testimony that its economy and economic development was injured in a specific amount which is capable of being reasonably estimated. Yet, in open violation of this Court's dictates in *Bigelow,* the Court of Appeals reasoned that the mere possibility that uncertainty might exist as to measurement of damages must be resolved against the innocent victim of an antitrust violation. The wrongdoers thus retain the fruits and profits of their illegal acts because of the potentiality of uncertainty in measuring damages.

(2) Under an alternative theory of damages, the State in its capacity as *parens patriae* may recover as trustee, guardian and representative of its otherwise remediless citizen-consumers who were injured

by the price-fixing conspiracy. The damage in this respect is the illegal excess which Hawaii's consumers were overcharged over and above the fair and competitive price which would have been in effect but for the conspiracy. Damages would be ascertained simply as an amount equal to that overcharge, and such funds would be held and/or expended by the State as trustee for the benefit of the citizens.

In the final analysis, the decision and opinion of the Court below must be seen for what it is—a ruling antagonistic to the effective enforcement of national economic policy through the antitrust laws. Nowhere is this "anti-antitrust" attitude more clearly demonstrated than in that portion of the Ninth Circuit Court's opinion below concerning the "indirect" nature of the injury suffered by the State of Hawaii as *parens patriae*. Such concepts as "indirect" injury, "target area", "consequential" injury, "remote" injury and the like have been too frequently used by lower federal courts to restrict the availability of the treble-damage remedy to antitrust plaintiffs. It is as though these courts believe that the enforcement of the antitrust policy of the United States should be restricted rather than encouraged. These rulings have been made in the face of this Court's numerous and specific directions to the contrary. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *Radovich v. National Football League*, 352 U.S. 445 (1957).

In the instant case, this Court should reaffirm its ruling in *Georgia v. Pennsylvania R. Co.*, *supra*, establishing that an injury to the economy of a State is a

direct and *foreseeable* result of the type of anti-competitive conduct alleged against respondents herein; and, therefore, a civil action to remedy such an injury may be maintained by the State as *parens patriae* under the "antitrust acts" including Section 4 of the Clayton Act. See: *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967); *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir. 1966); *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970).

The decision of the Court of Appeals below ordering the dismissal of petitioner's *parens patriae* claim must be reversed. The maintenance of the *parens patriae* claim is necessary to the continuing efficacy of the civil damage antitrust remedy. Any other result would permit the respondents to retain the enormous profits which they extracted from the economy and citizen-consumers of the State of Hawaii as a result of their flagrant and illegal price-fixing conspiracy, and would encourage other antitrust violators to initiate or continue similar pervasive price-fixing activity aimed at and directed against massive numbers of consumers.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS BELOW ERRONEOUSLY EMASCULATES THE EFFECTIVENESS OF THE CIVIL ACTION PURSUANT TO SECTION 4 OF THE CLAYTON ACT AS A VITAL MEANS FOR ENFORCING THE ANTITRUST POLICY OF THE UNITED STATES.

By its decision and opinion in the present case, the Court of Appeals for the Ninth Circuit has emasculated this Court's ruling in *Georgia v. Pennsylvania R. Co.*,

supra. But equally as significant, the Ninth Circuit's decision has further contributed to the erosion of the civil antitrust remedies provided by Congress as a significant component in the vigilant enforcement of national antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947). In its *Perma-Life Mufflers* ruling, this Court condemned judicially created restrictions which ". . . threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." 392 U.S. at p. 136.

The Court of Appeals invoked every imaginable theory and device to deny the State of Hawaii the right to maintain its civil antitrust action and thereby obtain financial redress for the antitrust violation here alleged which resulted in such substantial illicit profits for the respondents.

The lower court rejected the possibility that such a pervasive price-fixing conspiracy occurring in the socially and commercially crucial oil industry could result in a financial injury to the economy and economic well-being of the State. Such a finding implicitly rejects this Court's ruling in *Georgia v. Pennsylvania R. Co.* The Court also seemed to rule that even if such an injury could be recognized, no specific or precise measure of damages could be articulated. Thus, the plaintiff is apparently precluded and foreclosed even prior to trial and as a matter of law from developing and submitting the relevant economic data from which damages may be reason-

ably estimated. Such a position is totally inconsistent with such decision as *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251 (1946). The Court of Appeals went on to rule that even if the fact and amount of damages could be determined herein, the injury was remote, indirect and outside the area of the economy ("target area") endangered by the respondents' illegal conspiracy; moreover, it ruled that an injury *parens patriae* was not an injury to the "business" or "property" of the State of Hawaii within the meaning of Section 4 of the Clayton Act.

In this respect, the decision of the Court of Appeals in our present case not only reflects the judicially created chaos surrounding the question of standing under Section 4, it proceeds to compound that confusion and further obfuscate standing considerations by restrictively construing the words "business" and "property" in such a way as to limit the availability of this civil antitrust remedy and thereby weaken the effectiveness of the treble-damage action as a means for enforcing national antitrust policy. This Court, then, must forcefully reiterate the position which it has consistently followed of liberalizing the availability of the civil treble-damage remedy. Note, *Standing To Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L. Rev. 570 (1964).

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948), this Court stated, concerning Section 4:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors or to

> sellers. Nor, does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; *American Tobacco Co. v. United States*, 328 U.S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." [Citing *United States v. South-Eastern Underwriters Ass'n.*, 332 U.S. 533, 553 (1948).]

In *Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957), the Court appeared to be specifically chastising those lower courts which had restrictively limited the standing of treble damage plaintiffs:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Publishing Co. v. United States*, 1953, 345 U.S. 594, 614, *and meet the requirement that petitioner has thereby suffered injury.* Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." (Emphasis added.)

See also: *Radiant Burners v. People's Gas & Light Co.*, 364 U.S. 656, 660 (1961).

In the light of this emphatic and express legislative and judicial policy favoring the availability of the civil remedy, it is almost incredible (especially in view of the *Georgia* case) that the respondents would stand before this Court and contend that although they have illegally

extracted several million dollars from the economy and citizens of the State of Hawaii, the State as *parens patriae* lacks standing to seek damages for redress of this pervasive antitrust violation. Any decision short of recognizing the right of the State as *parens patriae* to maintain this action for damages as well as injunctive relief would result in permitting respondents to retain *all* or at least *a substantial portion* of the illicit profits which they realized through their alleged price-fixing conspiracy.

II. THE STATE OF HAWAII SHOULD BE PERMITTED TO MAINTAIN THIS CIVIL ANTITRUST ACTION FOR DAMAGES AND INJUNCTIVE RELIEF IN ITS CAPACITY AS PARENS PATRIAE.

A. The Parens Patriae Remedy is Necessary in the Present Case.

Respondents, in their historical discussion of the *parens patriae* doctrine and the original jurisdiction cases in the Court below, mistakenly characterized the present action. The numerous cases cited by respondents, including *Oklahoma v. Cook*, 304 U.S. 387 (1937); *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Louisiana v. Texas*, 176 U.S. 1 (1900); *New Hampshire v. Louisiana; New York v. Louisiana*, 108 U.S. 76 (1883) and the more recent *Land O'Lakes Creameries v. Louisiana*, 160 F. Supp. 387 (E.D. La. 1958), all rule merely that a state may neither sue as *parens patriae* nor initiate an original action in the Supreme Court if the state is attempting to enforce the rights of a small and well-defined group of private citizens. The allegations of the complaint herein demonstrate that our case is completely distinguishable. The State of Hawaii does not here seek to

vindicate the private claims of its citizen-consumers. The individual injuries to these citizens were sought to be remedied through Count Three of the amended complaint in a class action in their behalf. However, the District Court dismissed the class action, at the urging of respondents that the class would be so large and diverse as to make adjudication of the individual claims of each consumer impossible. (R. 68) (App., p. 80.) A class comprising all of the consumers injured by the violation was consistently urged by respondents to be unmanageable (App. pp. 47-50, 74, 80) and the District Court agreed.

Thus, the hundreds of thousands of injured citizens who were consumers of respondents' refined petroleum products in Hawaii are unable to join in a class action. Individually their injuries are so small that realistically —and historically—it cannot be contemplated that their claims will ever be brought. Indeed, the statute of limitations has expired as to most of the period involved here without consumer actions having been initiated. Thus, if the decision of the Court of Appeals is allowed to stand, respondents will be permitted to retain the bulk of the revenue which they unlawfully extracted from the consuming public in the State of Hawaii.

Standard, Union, Shell and Chevron did (we must here assume) enter into a conspiracy to establish and impose artificially inflated prices for gasoline and other petroleum products in the Hawaii market and these respondents illegally derived substantial profits as a result of their monopolistic conduct. Is their wrong to go unremedied? Will these wrongdoers be permitted to profit from their illegality?

Our legal system must not and does not tolerate such unjust enrichment. A widespread anti-competitive discriminatory price-fixing conspiracy which, in its pervasiveness, victimizes millions of citizen-consumers in a particular state may cause a significant injury to the economy of the state itself. Such injury, if found to exist, may be remedied through an action brought by the state in its capacity as *parens patriae*. *Georgia v. Pennsylvania R. Co., supra.*

The necessary effect of decisions, such as that of the Court of Appeals below, would be to encourage manufacturers and sellers of mass-produced, widely distributed consumer products to engage in profitable antitrust violations. So long as the impact of the anti-competitive practice is sufficiently and pervasively distributed among millions of consumers, under the reasoning of the Court below, such monopolists will be able to retain their illegal profits. Government fines are but a miniscule fraction of the conspirators' illicit gains, and class actions are impractical because of the size of the prospective class and the relatively small financial loss of each class member.

Indeed, the decision of the Court of Appeals, if not reversed, would ironically encourage would-be antitrust violators to spread the anti-competitive effect of their illegal price-fixing over as large a portion of the consumer population as possible. The more comprehensive the illegal program, the better chance of avoiding any meaningful private treble-damage action.

This Court has recognized this dilemma in another context. In *Hanover Shoe, Inc. v. United Shoe Machinery*

Corp., 392 U.S. 481 (1968), this Court rejected the application of the "pass-on" defense, observing:

> "*These ultimate consumers,* in today's case the buyers of single pairs of shoes, *would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them.* Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. at 494. (Emphasis added.)

Our case presents a situation more critical and urgent than that in *Hanover Shoe.* For here, as in *Hanover Shoe,* the hundreds of thousands of injured consumers have no practical antitrust remedy, but in addition, there exists in our case no "middlemen" who can effectively prevent the wrongdoers from retaining "the fruits of their illegality."

The reversal of the decision of the Court below and reaffirmation of the propriety of the *parens patriae* damage remedy as envisioned in the *Georgia* case provides the only effective means of dealing with such comprehensive antitrust violations.

The State of Hawaii has alleged that the subject matter of respondents' conspiracy concerns the prices charged for products in the Hawaiian market and that in Hawaii such prices are maintained at a discriminatorily high level as compared to prices for the same products in other United States' market areas. From the complaint

petitioner's contention is clear: that pursuant to this anti-competitive conspiracy, the respondents have predatorily preyed upon the numerous petroleum product consumers in Hawaii and have thereby caused substantial injury to the economy of the State.

This Court, then, must follow the dictates of its decision in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 445 (1945), where it was stated:

> "... we construe the allegation ... as a charge that defendants have conspired to fix rates so as to discriminate against Georgia."

In our case, as in the *Georgia* decision, respondents are alleged to be guilty of combining to fix prices in Hawaii. As such they have discriminated against Hawaii *as a state*. It is not necessary for the maintenance of this *parens patriae* claim to allege or prove that the respondents, in establishing discriminatorily high prices in Hawaii, acted with malice or ill-will against the State or its consumers. For, regardless of their intention, the impact of the alleged price-fixing conspiracy is equally injurious to the Hawaii economy. As the complaint alleges, in part: revenues have been unjustifiably extracted from the State's economy; opportunities in manufacturing, shipping and commerce have been restricted and curtailed; the high cost of manufacturing in Hawaii has precluded its products from equal competitive access to the national market as compared with those of other states; and the Hawaii economy has been held in a state of arrested development (R. 51).

Contrary to respondents' argument in the courts below, then, this case *does* involve a conspiracy to discriminate

against the State of Hawaii and its citizens. And, as a consequence of that conspiracy, the State of Hawaii suffered an injury to its economy. Under *Georgia v. Pennsylvania R. Co., supra,* the antitrust claim asserted by the State of Hawaii as *parens patriae* is properly alleged.

B. Georgia v. Pennsylvania R. Co. Established the Right of the State of Hawaii, as Parens Patriae, to Maintain an Antitrust Action as Alleged in Count Two of the Amended Complaint.

Respondents, in their briefs below, devoted extensive verbiage to an historical study of the *parens patriae* action and its utilization in permitting a sovereign to bring an action on behalf of legally incompetent citizens. Petitioner submits that this historical analysis, while interesting, is essentially irrelevant to the current action. It is clear under modern law that the state has the right to bring suit as *parens patriae* on behalf of all, or even a substantial portion of its citizens, whether or not they are legally competent. *Georgia v. Pennsylvania R. Co., supra; Land O'Lakes Creameries v. Louisiana,* 160 F.Supp. 387, 389 (E.D. La. 1958).

Other cases cited below by respondents concerned cases where the state improperly invoked the *parens patriae* doctrine in order to obtain original jurisdiction in the Supreme Court and circumvent the Eleventh Amendment in pressing what were essentially the private and individual claims of a relatively small and well-defined group of private citizens, *New Hampshire v. Louisiana; New York v. Louisiana,* 108 U.S. 76 (1883); *Louisiana v. Texas,* 176 U.S. 1 (1900); *North Dakota v. Minnesota,* 263 U.S. 365 (1923); *Oklahoma v. Cook,* 304 U.S. 387 (1937).

For example, in *Oklahoma v. A.T.&S.F. Ry.*, 220 U.S. 277 (1944) (also relied upon heavily by respondents below) the *parens patriae* issue was not even mentioned by this Court. That case involved primarily questions of the Court's original jurisdiction and the Eleventh Amendment neither of which are relevant here. Subsequently, the Supreme Court had occasion to characterize the *Oklahoma* case as "... a suit brought in the name of the state [but] in reality for the benefit of particular individuals" (324 U.S. at p. 446).

Of more relevance is another line of cases in which it was clear that the state, suing as *parens patriae* was pursuing its own interest or the *interest of a substantial portion of its citizens at large.* Thus, the propriety of the *parens patriae* suit was recognized and the state was accorded standing. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230; *South Dakota v. North Carolina*, 192 U.S. 286 (1904); *Georgia v. Pennsylvania Ry. Co., supra.* For clear guidance in determining the State of Hawaii's standing under Count Two in the present action, this Court must look to its most recent, most relevant, and most authoritative decision—*Georgia v. Pennsylvania R. Co., supra.*

The ruling of that case was that the state, as *parens patriae,* may maintain an action to remedy a violation of the antitrust laws, specifically with respect to violations of the Sherman Act. The Court recognized that a widespread, anti-competitive conspiracy in a major industry which results in imposition of an inflated and discriminatory pricing structure on the economy of a state constitutes a *serious public wrong.* The discriminatory pricing scheme alleged in the present case permits the respond-

ents to inflate their prices for all refined petroleum products (which in today's society are "necessities") at the expense of the economic well-being of Hawaii and its citizen-consumers. The Court in *Georgia v. Pennsylvania R. Co.*, recognized that when such discriminatory pricing policies are directed at the citizens and consumers of a particular state they

> ". . . may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a state as profoundly as the diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a state or put it at a decided disadvantage in competitive markets . . . . But discriminatory rates fastened on a region have . . . a more permanent and insidious quality. Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister states." 324 U.S. at 450-451.

Whatever implications the *Oklahoma* case and earlier decisions had regarding the *parens patriae* doctrine, such were completely superseded by *Georgia v. Pennsylvania R. Co., supra. Georgia* established, beyond question, that a state may maintain an action as *parens patriae* under the antitrust laws to remedy discriminatory rate or price-fixing conspiracies which are directed at that state's economy. Our present case is nearly identical to the situation in *Georgia*. As in *Georgia*, the case at bar *does*

allege a conspiracy, the impact of which, discriminates against the State of Hawaii and its citizens and injures the State's economy and prosperity. When a group of private conspirators combine to inflate prices for a necessary service or commodity and direct their discrimination against a substantial number of the consumers in a state, the state suffers an injury and it may—in its own name—seek an appropriate remedy. (324 U.S. at p. 447.)

Much of the argument in the courts below concerned the respondents' claim that a *parens patriae* action by the State could result in a double recovery against them. In support of this argument, respondents submitted a law review article which, it must be noted, was authored by two attorneys who are currently active in defending other *parens patriae* antitrust cases. Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws,* 65 N.W. L. Rev. 193 (1970).

This argument fails to recognize that the *parens patriae* claim here asserted by the State of Hawaii seeks recovery for injuries which *it* has sustained in its quasi-sovereign capacity. Compare: *Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra.* Moreover, respondents have ignored the fact that the *parens patriae* remedy by the State "... is classically exercised 'for the prevention of injury to those who cannot protect themselves' ". *Mormon Church v. United States,* 136 U.S. 1, 57 (1890). It has already been established here that the vast majority of citizen-consumers in Hawaii have no effective or feasible remedy on an individual basis to protect themselves from respondents' price fixing conspiracy. See Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo.

Wash. L. Rev. 1031, 1048-1049 (1969); Note, *Antitrust Remedies*, 23 Vanderbilt L. Rev. 405, 411 (1970).

In nearly every successful *parens patriae* action which has been initiated in the past, it would be possible to identify individual injuries to particular private citizens. Thus, the mere fact that Hawaiian consumers of respondents' petroleum products were individually injured by the price fixing conspiracy does not preclude the State of Hawaii from maintaining an independent action to remedy the *separate injury* to its economy.

In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), the states of Pennsylvania and Ohio were permitted, as *parens patriae*, to enjoin West Virginia's interference with the flow of natural gas to the plaintiff states and their citizens. The United States Supreme Court ruled:

> "The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. *This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected.* It is not merely a remote or ethical *interest* but one which is immediate and *recognized by law.*" (262 U.S. 592) (Emphasis added).

Many of the early *parens patriae* actions were allowed to remedy numerous varieties of nuisances which harmed private citizens in the plaintiff states, including cases involving the diversion of water, water pollution and air

pollution. *Kansas v. Colorado,* 206 U.S. 46 (1906); *Missouri v. Illinois,* 180 U.S. 208 (1901); *Georgia v. Tennessee Copper Co., supra.* In all of these cases, the Supreme Court recognized that the interests of the states were separate and apart from the related injury to their individual citizens. *Pennsylvania v. West Virginia, supra.* And in each case the utilization of the *parens patriae* remedy was permitted by the states because it was pursued to redress injuries which affected substantial portions of the citizenry. *South Dakota v. North Carolina, supra.*

Against the historical background of these cases in which the states were allowed to sue for injuries to themselves as well as to substantial portions of their inhabitants, the result reached in *Georgia v. Pennsylvania R. Co., supra,* logically and properly followed. In that case, it was alleged that certain railroad carriers had combined and conspired to fix freight rates at an unreasonably high and discriminatory level. It was further charged that this illegal situation caused injury to every shipper of goods within the State of Georgia. The State, as the plaintiff, alleged that it was economically injured in its proprietary capacity as the owner and operator of a railroad and as a large shipper of goods. However, the State of Georgia further contended that it possessed a cause of action "as *parens patriae* acting on behalf of [its] citizens" (324 U.S. at 450).

The Supreme Court agreed with the position advocated by Georgia, noting that the State had alleged that the illegal conspiracy injured its economy. The Court left no doubts as to the right of a State to initiate actions *parens patriae.*

> "But Georgia is not confined to suits designed to protect only her proprietary interest. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, *has injured the economy of Georgia.* Those rights are of course based on federal laws . . .
>
> "And we find no indication that when Congress fashioned those civil remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the antitrust acts*" (342 U.S. at 447) (Emphasis added).

This line of *parens patriae* cases, culminating in *Georgia v. Pennsylvania R. Co.,* clearly recognizes that when private wrongdoers pursue illegal activities directed against a substantial portion of the population of a particular State resulting in the systematic economic exploitation of those private individuals or their property, separate, albeit related, injuries are suffered by the individual citizens and the State itself.

In the instant case, the State of Hawaii has alleged that the respondents managed to dominate and control the market for refined petroleum products in Hawaii and used this combined power to overcharge Hawaiian consumers. Under the ruling of *Georgia v. Pennsylvania R. Co.,* this conduct was an actionable wrong harmful to the economic well-being of Hawaii itself, for which the State may seek remedies in this *parens patriae* action which are appropriate to compensate it for the injury suffered, and to enjoin further harm.

In this case, as in the *Georgia* case, the State of Hawaii has alleged direct pecuniary injury which it has suffered in its operation of public agencies and institutions. In this case, as in the *Georgia* case, the State has alleged statewide conspiratorial price discrimination in an essential industry, "a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister states" (324 U.S. at 451).

The ruling of the District Court below correctly applied the *Georgia* case as binding and controlling precedent, and recognized that the State of Hawaii's amended complaint properly alleges its claim as *parens patriae*. The State is suing in its own right, not derivatively on behalf of private citizen-consumers; and the wrong perpetrated by respondents was a widespread one diffused over such a large and substantial portion of the inhabitants that no effective remedy exists on an individual basis.

The opinion of the Ninth Circuit Court below in reversing and ordering the dismissal of the *parens patriae* claim seems to fly in the face of this Court's decision in the *Georgia* case. The Court of Appeals expressed the opinion that the general economy is an abstraction which has no value in itself and, further, that it was doubtful that the general economy of a state could suffer an independent harm—even in a case such as ours involving a pervasive price-fixing conspiracy in a major industry which provides essential goods and services to individual and large commercial consumers. The decision of the Court

of Appeals below thus fails to follow the letter and spirit of the *Georgia* case by rejecting the basic premises of this Court's ruling: that a conspiracy as here alleged does cause a measureable injury to the economy and economic development of the State and its citizens; and such injuries and the accompanying requests for judicial relief raise justiciable issues under the antitrust laws. Accordingly, the judgment of the Court of Appeals, reversing the District Court and remanding the case for dismissal of the *parens patriae* claim, is clearly inconsistent with this Court's prior rulings.

III. PETITIONER STATE OF HAWAII, AS PARENS PATRIAE, MAY RECOVER DAMAGES UNDER SECTION 4 OF THE CLAYTON ACT.

Having established the propriety of this *parens patriae* action, under *Georgia v. Pennsylvania R. Co., supra,* as a remedy against a statewide, pervasive, price-fixing conspiracy which victimizes the citizen-consumers of the State of Hawaii, it cannot be denied that injunctive relief must be available to prevent the continuation of such an antitrust violation. *Georgia v. Tennessee Copper Co., supra; Pennsylvania v. West Virginia, supra.*

The Court of Appeals below ruled, however, that under no circumstances could the State of Hawaii recover damages. The Court neglected to explain what would become of the vast amounts of money that (accepting the allegations of the complaint as true) respondents have illegally extracted from the economy of Hawaii and the citizen-consumers of that State. But that consideration aside, the

law as construed, developed, and articulated by this Court in defining the nature of *parens patriae* actions and the policy of enforcement of the antitrust laws through civil treble-damage litigation, recognizes the propriety of recovery of money damages as sought by the State of Hawaii in this action.

A. Georgia v. Pennsylvania R. Co. Recognizes that All of the Civil Remedies and Sanctions of the Antitrust Laws Are Available to the State in An Action as Parens Patriae.

In *Georgia v. Pennsylvania R. Co., supra,* as in our case, the State sought relief from defendants who were engaged in a conspiracy in violation of the Sherman Act. In *Georgia,* as in our present case, the State sued in its proprietary capacity. In *Georgia,* as in our present case, the State sued as *parens patriae* invoking two separate but related theories in support of that status: *Georgia* sought to recover as *parens patriae* in its sovereign capacity for injury to its economy (First Count) and as *parens patriae* in its quasi-sovereign capacity as agent and protector of its citizens at large (Second Count). 324 U.S. at p. 443. Similarly Hawaii, as *parens patriae,* in its sovereign and quasi-sovereign capacities seeks to recover for injuries to its economy and economic development, and as trustee, guardian and representative of its citizens. (R. 50-51) (App., p. 64).

There has been much debate throughout the proceedings below as to whether, in *Georgia,* the State sought to recover damages. The answer is clear. Georgia sought to recover damages in the amount of $5,000,000 under each *parens patriae* Count. Similarly, in the present case the State of Hawaii seeks money damages arising out of

respondents' price fixing conspiracy which adversely affected the economy of the State and wrongfully extracted revenues from its consumers.

In *Georgia,* the Supreme Court ruled that an illegal conspiracy which operates to discriminatorily inflate prices for an essential service or commodity within a state is a wrong which harms the economy of that State. Thus, under *Georgia v. Pennsylvania Railroad,* such a wrong is "a matter of grave public interest in which the State, as the representative of the public, has a concern apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and *recognized by law*" (324 U.S. at 451) (emphasis added); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). And as the Court ruled in *Kansas v. Colorado,* 206 U.S. 46, 99, the State of Hawaii here

> ". . . is not acting directly and solely for the benefit of any individual citizen to protect his [private] rights. Beyond its property rights it has an interest as a state . . . . Its prosperity rises, therefore, above a mere question of local, private right and involves a matter of state interest, and must be considered from that standpoint."

In short, Hawaii's right as *parens patriae* to bring this action exists as "an interest independent of and behind the titles of its citizens." *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907); *Georgia v. Pennsylvania Railroad, supra.* The Court of Appeals and respondents must admit the propriety of suits *parens patriae* for equitable relief. However they totally ignore the historical parallelism as to the interests protected by Section 4 (treble-damage remedy) and Section 16 (injunc-

tive relief) of the Clayton Act. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-133 (1969). It is anomalous to contend that an antitrust violation of the nature alleged herein causes legal injury sufficient to accord the State standing as *parens patriae* to seek an injunction under Section 16, but not sufficient to accord standing to obtain damages under Section 4 for the legal injury suffered. If there is an antitrust injury to a legally protected interest (i.e., "property") of the plaintiff, then that plaintiff may seek *all* available "remedies" and marshal all statutory "sanctions" under the federal "antitrust acts." 324 U.S. at p. 447.

This Court must reject the view expressed by the Court of Appeals (App., p. 104) that the scope of interests protected by the injunctive relief afforded under Section 16 of the Clayton Act (15 U.S.C. §26) is broader than the coverage of Section 4. Such an argument ignores the well-established and historically recognized identity of purpose which underlies both Sections 4 and 16. The two provisions merely create different remedies as alternative (and often cumulative) means of protecting the same interests and promoting the same policies. Thus, Section 16 permits a party in a civil action to obtain injunctive relief only if that party can demonstrate ". . . a threatened loss or damage . . ." to economic interests which the plaintiff has a legal right to protect. *United States v. Borden Co.*, 347 U.S. 514, 51 (1954). As this Court stated in the *Borden* case:

> "Under Section 16 of the Act, 15 U.S.C. §26, a private plaintiff may obtain injunctive relief against such violations only on a showing of "threatened

> loss or damage''; and this must be of a sort personal to the plaintiff, *Beegle v. Thomson,* 7 Cir. 1943, 138 F.2d 875, 881. *The private-injunction action, like the treble-damage action under §4 of the Act,* supplements Government enforcement of the antitrust laws . . . .'' 347 U.S. at p. 518 (Emphasis added.)

Accordingly, only if an antitrust plaintiff suffers an injury or is threatened with an injury to his economic or property interests is he allowed to seek relief through damages *or* injunction. It is, therefore, inconsistent to hold, as the Court of Appeals suggests, that the injury to the State of Hawaii was of sufficient economic or proprietary impact to confer standing on it as *parens patriae* to seek injunctive relief under Section 16, but not damages under Section 4. As this Court has most recently observed in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100 (1969) the only difference between the injunctive and treble-damage remedies is that the latter requires proof of past injury whereas the former requires proof of ''threatened'' injury. 395 U.S. at p. 130. Moreover, in making it clear that both civil remedies seek to vindicate the same private interests and public policies, the Court observed in *Zenith* that:

> ''We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by §16, should not respond to the 'salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.' *NLRB v. Express Publishing Co., supra,* 312 U.S. at 436. Although a district court may not enjoin all future illegal conduct of the defendant, or even all future

violations of the antitrust laws, however unrelated to the violation found by the court, e.g. *New York, N.H. & H.R. Co. v. ICC*, 200 U.S. 361, 401 (1906), '[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.' *International Salt Co. v. United States*, 332 U.S. 392, 400, 68 S. Ct. 12, 17, 92 L.Ed. 20 (1947). *This is particularly true in treble-damage cases*, which are brought for private ends, but which also serve the public interest in that 'they effectively pry open to competition a market that has been closed by defendants' illegal restraints.' *Id.*, at 401." 395 U.S. at p. 133. (Emphasis added.)

The recognition of the identity of purpose and interests covered by the civil injunctive and damage antitrust remedies is significant regarding the applicability of the *Georgia* decision to petitioner's present prayer for damages. For if Hawaii, as *parens patriae*, can obtain injunctive relief to prevent the continuation of the injury it has suffered, then it is similarly entitled to seek damages for that injury. Any other interpretation would be illogical under Section 4, and render meaningless this Court's ruling in *Georgia v. Pennsylvania R. Co.*

On the other hand, if this Court's decision in *Georgia* is, as petitioner here contends, a controlling and well-reasoned interpretation of the law concerning the availability of the civil antitrust remedy, then it is clear that, as *parens patriae*, the State of Hawaii is entitled to avail itself of all the remedies of the federal antitrust laws, including the right to collect damages for the injuries which it has suffered:

> "But when it came to other *sanctions*, Congress followed a different course and authorized civil *suits* not only by the United States, but by other persons as well. And we find no indication that when Congress fashioned those civil *remedies*, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the antitrust *acts*" (324 U.S. at 447). (Emphasis added.)

In distinguishing *Oklahoma v. A.T.&S.F.R. Co., supra*, this Court went on to rule:

> "This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the *gravamen of which runs far beyond the claim of damage to individual shippers.*
>
> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor *meets the standards of justiciability* and since *Georgia is a 'person' entitled to enforce the civil sanctions* of the antitrust *laws*, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail." (324 U.S. at 452.) (Emphasis added.)

Notice that in the above quotations from the most relevant and authoritative decision applicable to our present case, this Court recognized that a *parens patriae* action (such as petitioner's herein) may be used to pursue "civil *remedies*" under the federal "antitrust *acts*" and as such it is an appropriate vehicle "to enforce the civil *sanctions* of the antitrust *laws*." The use of the plural form in all of these words cannot be regarded as coinci-

dental, especially in light of the substantial request for damages of at least five million dollars which Georgia made as *parens patriae*. Rather they indicate that the full spectrum of civil antitrust remedies, including damages, is available in a *parens patriae* suit. There is nothing in the Court's language that would negate the propriety of damages in the present case.

In the *Georgia* case, the Supreme Court denied the State's request for damages, not because the suit was *parens patriae*, but solely because the suit involved the railroad and shipping industry in which Congress had expressly prohibited rebates. *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156 (324 U.S. at 453).

> "If a shipper could recover under Section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate operate to give him a preference over his trade competitors."

Thus, this Court was of the view that if the State of Georgia was permitted to recover any money damages whatsoever arising out of the illegal over-charge—irrespective of the capacity in which it was suing or the Count under which the recovery was obtained—such damages would effectively operate as a preferential rebate in violation of the Congressionally approved I.C.C. transportation policy. It is significant, in light of the substantial prayer for damages by Georgia as *parens patriae*, that this Court did not rule, nor did it even suggest, that money damages could not be recovered merely because of the *parens patriae* nature of the claim.

The Court of Appeals below, however, seized upon the superficial fact that no damages were awarded to Georgia and, rather than analyzing the reasons for denial of damages, erroneously concluded that damages may never be recovered by a state as *parens patriae* under Section 4 of the Clayton Act. The lower court's reliance on the "injunction-damages" dichotomy underscores the weakness of its analysis. For as stated above, if an injury is a legally cognizable one under the antitrust laws, both remedies should be available.

It must be remembered that a wrong committed against a state in its *parens patriae* capacity is an independent injury to an interest which ". . . is not merely a remote or ethical interest, but one which is immediate and recognized by law" *Georgia v. Pennsylvania R. Co., supra,* 324 U.S. at 451; *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). For such a legally recognized wrong, there must exist appropriate judicial remedies. To the extent that such a wrong causes economic loss—a damage remedy must be afforded. To argue that the past economic injury suffered by Hawaii should go uncompensated and that the State must be satisfied with restricting the future operation of the harmful activity defies logic, enlightened antitrust policy, and common sense.

Under our law, injunctive relief is an equitable remedy which is appropriate only in extraordinary cases. Damages, on the other hand, is a more commonplace remedy and hence more readily available. Yet the Court of Appeals below, in a classic example of quoting a sentence out of context, observed that *Georgia v. Pennsylvania R. Co.* involved an injunction to deter an illegal combination

then cited this Court's language in the case at 324 U.S. at p. 462: "No more is envisaged here."

That statement in the *Georgia* case was made with respect to the propriety of granting an injunction which would affect future shipping rates, the setting and approval of which are under the jurisdiction of the Interstate Commerce Commission. The words: "No more is envisaged here", do not imply, as the Court of Appeals suggests, that *parens patriae* damage actions are out of the question. Rather, when read in context, this sentence merely indicates that the granting of an injunction restraining defendants from illegally and coercively fixing rates would not interfere with the policies and subsequent official rate regulations of the I.C.C.:

> "No more is envisaged here. If the alleged combination is shown to exist, the decree which can be entered will be no idle or futile gesture. It will restore that degree of competition envisaged by Congress when it enacted the Interstate Commerce Act. It will eliminate from rate-making the collusive practices which the anti-trust laws condemn and which are not sanctioned by the Interstate Commerce Act. It will supply an effective remedy without which there can be only an endless effort to rectify the continuous injury inflicted by the unlawful combination." 324 U.S. at p. 462.

Unlike the *Georgia* case, our present action does not involve the transportation industry or any other industry whose rates and prices are set by federal law, so the reasoning in *Georgia* which precluded recovery of damages does not apply in the case now before this Court. It must therefore be recognized that the State of Hawaii,

petitioner herein, may utilize *all* available antitrust remedies—damages as well as injunctive relief to vindicate the injury to its interest as *parens patriae* ". . . which is immediate and recognized by law." The District Court, then, after a careful reading of the entire *Georgia* opinion properly concluded that the only rational inference to be drawn from that case is that an antitrust claim for damages as *parens patriae* was properly asserted by Georgia there and by Hawaii here. As the District Court below incisively stated:

> "Certainly the broad objectives of the antitrust statutes are not to be meanly or narrowly curtailed because it is a state that brings a damage claim thereunder in a *parens patriae* capacity." (R. 63-64.)

B. The State of Hawaii has Standing Under Section 4 of the Clayton Act to Maintain this Action for Damages, as Parens Patriae.

The Court of Appeals ruled that petitioner's suit as *parens patriae* was not cognizable under Section 4 because the State of Hawaii was not injured in its "business" or "property". Thus, the crucial issue which this Court must resolve is whether an injury to the economy of the State of Hawaii constitutes a well-defined and compensable economic loss. Petitioner submits that this Court has previously answered that question in the affirmative in *Georgia v. Pennsylvania R. Co., supra,* where it ruled:

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, *has injured the economy of Georgia.* Those rights are of course based on federal laws . . .

> "And we find no indication that, when Congress fashioned those civil remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the antitrust acts.*" 324 U.S. at p. 447). (Emphasis added.)

In our case, the District Court properly followed the dictates of *Georgia* and recognized that suits *parens patriae* are included within the purview of *all* civil antitrust remedies. If the economy of a state can be injured by monopolistic activity, sound antitrust enforcement policy demands that civil actions initiated pursuant to Section 4 be available to remedy such injuries.

It seems clear that in its *Georgia* decision this Court has established that when an antitrust violation is serious enough to injure the economic development of the State, then the resulting damage is an injury to a legally protectable property interest of the State. Is that not the only logical inference to be drawn from the *Georgia* ruling which accords the State—as *parens patriae*—the standing to protect that very interest?

The Court of Appeals below failed to see the nature and extent of the injury to the State of Hawaii. Moreover, it failed to recognize that the word "property" in Section 4 of the Clayton Act includes all economic injuries to a plaintiff which the antitrust laws seek to prohibit. Compare: *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931); *South Carolina Council of Milk Producers v. Newton,* 360 F.2d 414 (4th Cir. 1966);

Mulvey v. Samuel Goldwyn Productions, supra; Waldron v. British Petroleum Co., 231 F. 72 (S.D.N.Y. 1964).

In defining the type of "property" interests protected under Section 4 of the Clayton Act, the Court in *Waldron, supra* stated:

> "The statute explicitly uses the words 'business or property' in the disjunctive. Congress intended this distinction to be meaningful. The word 'property' has wider scope and is more extensive than the word 'business'. *Less is required to prove 'property' than to prove 'business'.*
>
> "*The statute does not set up a qualitative or quantitative test to determine the existence of 'property'.* Nor does the statute contain a built-in definition.
>
> "The word 'property' is, in a sense, a conclusory term, i.e., *an interest which the law protects.* A determination whether plaintiff has 'property' involves *a value judgment as to whether that which plaintiff factually possesses should be legally protected.* If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses 'property'." 231 F.Supp. at 86. (Emphasis added.)

This Court, in *Georgia v. Pennsylvania R. Co., supra,* has already made the "value judgment" that an injury to the economy and economic well-being of the state in its *parens patriae* capacity is the type of "property" protected by the antitrust laws. Therefore, the injury caused by respondents herein to that property interest of the State of Hawaii may be remedied by a damage action pursuant to Section 4. Inasmuch as petitioner has shown

that it is within the class of persons entitled to the protection of the antitrust laws, and that the injury caused is the type that the antitrust laws seek to prevent, both national policy and the law as articulated by this Court demand that petitioner be accorded the right to maintain and pursue this present action. See, for example, *South Carolina Council of Milk Producers v. Newton, supra*, 360 F.2d at pages 418-419, citing 64 Colum. L. Rev. 570, 585 (1964). See also: *Perkins v. Standard Oil of California*, 395 U.S. 642, 648 (1969); and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-701 (1962).

The law strongly favors the availability of private damage actions as an important component in the vigilant enforcement of national antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). What countervailing policy warrants the restriction of the damage action in the present case, merely because the petitioner's legally protected property interest is not tangible property which can be seen with the naked eye? It is clear that the respondents' conduct is of the type that the antitrust laws seeks to prohibit, and the interest of petitioner is "... within the zone of interests to be protected by . . ." such laws. See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

As this Court has stated on numerous occasions, in order to prevail under the Clayton Act, plaintiff need only prove a violation of the antitrust laws and resultant damage. *Radiant Burners v. People's Gas & Light Co.*, 364 U.S. 656, 660 (1961); *Radovich v. National Football*

League, 352 U.S. 445, 453-454 (1957); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 697 (1962); *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969).

In our present case, petitioner, the State of Hawaii, has alleged that respondents conspired to fix prices, which is a clear violation of Setcion 1 of the Sherman Act. Petitioner has also alleged that, as *parens patriae*, and by reason of respondents' antitrust violation, it has suffered substantial injury to interests which are protected by the "antitrust acts."

C. The Court of Appeals Erred in Ruling as a Matter of Law That the Economy of the State of Hawaii Could Not Be Injured by the Pervasive Conspiracy Here Alleged or That Any Such Injury Could Not Be Reasonably Measured in Damages.

The Court of Appeals, in open defiance of the *Georgia* ruling, questioned whether the economy of a state could in fact be injured by pervasive antitrust conspiracies such as those involved in *Georgia* and in our present case.

It would seem clear that *Georgia*, as buttressed by other *parens patriae* decisions of this Court, establish as a matter of law that a comprehensive and widespread price-fixing conspiracy in a major industry so crucial to the economic and commercial development of the State as is the oil industry causes an independent injury to the State itself which

> ". . . may affect the prosperity and welfare of a state. . . . They may stifle, impede, or cripple old industries and prevent the establishment of new ones . . . arrest the development of a state or put it

at a decided disadvantage in competitive markets." (324 U.S. at 450.)

The above-quoted words of this Court are not only consistent with sound social and legal policies under the antitrust laws, but also are in accord with sound economic theory. See, generally, Joe S. Bain, *Industrial Organization*, 1968; *Price Theory*, 1966; *Barriers to New Competition*, 1956; *The Economics of the Pacific Coast Petroleum Industry*, v. I-III, 1944-1947.

Modern technological and scientific advances have made it possible to determine the impact upon the economy of various anti-competitive and anti-social factors. See, for example, Isard, *et al.*, *On the Linkage of Socio-Economic and Ecological Systems*, 21 Papers of the Regional Science Ass'n., p. 79. (1968). As one commentator has observed:

> "The mathematical skills of economists and the availability of data about the economy have increased greatly in the last twenty years. Econometricians can now make rough mathematical descriptions of the key features of even so complex a system as the United States economy, and by means of input-output analysis, they can make crude estimates of damage to a regional economic unit. These calculations may be sufficiently precise for the measurement of damages in tort litigation. Moreover, in antitrust litigation the requirements of certainty of damages are applied more liberally in favor of the plaintiff than at common law. Further, it has long been recognized that exactness in measurement of damages is not necessary; it is sufficient that a reasonable basis for computation exists." *State Protection of Its Economy and Environment: Parens*

Patriae Suits for Damages, 6 Columbia Journal of Law and Social Problems, 411, 419-420 (1970).

Certainly, a pervasive price-fixing conspiracy such as is alleged herein, involves economic wastage and a misallocation of economic resources. Demetz, *Toward a Theory of Property Rights,* 57 American Econ. Review (1967); Neal, *et al., Report of the White House Task Force on Antitrust Policy, Antitrust Law & Economics Review,* Vol. 2, No. 2, Winter 1968-69, at p. 11. To the extent that the price-fixing conspiracy of the respondents operates here to "bleed" the economy of the State of Hawaii, it damages and detracts from various private proprietary interests held and limits the development of industrial opportunities—current and anticipated—within the State, and in turn, diminishes the tax base of that State. This is not only an injury to the business and property of the State, but also involves the kind of "economic inefficiency" [C. L. Allen, *The Framework of Price Theory,* p. 212 (1967] which the antitrust laws are designed to prevent. See also: Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo. Wash. L. Rev. 1031, 1048 (1969). In this age of advanced economic development, a statewide price fix on a widely used consumer commodity has a tremendous impact not only on the direct purchaser, but on the economy of the state as a whole. Samuelson, *Economics, an Introductory Analysis,* 265-267 (1951); Note, *Antitrust Remedies,* 23 Vanderbilt L. Rev. 405, 409-411 (1970). Manufacturing, farming, shipping, any industry requiring transportation by motor vehicle, are inevitably affected by such a price conspiracy. Indeed, it has been correctly observed that

virtually *every sector of the economy* is affected by monopolistic misallocation of resources:

> "Not only consumers, but those who control the factors of production—labor, capital and entrepreneurial ability—benefit when resources are permitted to move into fields of greatest economic return; competition induces such movement and monopoly inhibits it." *Report of the White House Task Force on Antitrust Policy, supra,* at p. 21.

As the District Court so astutely observed in our case (R. 62):

> "The court would judicially notice that there is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other petroleum products referred to in the present complaint, and perforce therefore, the cost thereof."

One example of the type of harm which has been caused by price-fixing conspiracies such as that alleged against respondents herein is the artificially inflated price structure for necessary items. Such price-fixing and area price discrimination leads to an overall and disproportionate increase in cost of living for the residents and consumers in the geographical area (here, the State of Hawaii) which is victimized by the conspiracy. (See Comparative Living Costs Table, U.S. Dept. of Labor Bulletin No. 1570-1, p. 12, Autumn, 1966 reprinted opposite p. 39 of Petition for Writ of Certiorari previously filed herein.)

The most significant error made by the Court of Appeals below, however, was its finding that even if the

fact of injury to the economy could be established, petitioner was foreclosed—as a matter of law—from trying to establish the amount of its damage. In effect the court concluded that it would be impossible for the State of Hawaii to present evidence of relevant economic data which would provide a jury with a basis for reasonably estimating the dollar amount of the damages suffered.

This view is patently erroneous and inconsistent with numerous rulings of this Court which have expressly recognized that in antitrust cases,

> "... *the jury may make a just and reasonable estimate of the damage based on relevant data* and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof' ... *Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.* It would be an inducement to make the wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. The most elementary conceptions of justice and public policy require that the *wrongdoer shall bear the risk of the uncertainty which his own wrong has created.*" *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. at pp. 264, 265. (Emphasis added.)

See also: *Story Parchment Co. v. Paterson Parchment Paper Co., supra; Eastman Kodak Co. v. Southern Photo Materials*, 273 U.S. 359 (1927); and *Continental Ore Co. v. Union Carbide & Carbon Corp., supra.*

Rather than following the dictates of the *Bigelow* case, the Court of Appeals *summarily* and *arbitrarily* stated that the State of Hawaii could not reasonably present evidence of its economic injury even though the State has not yet been given the opportunity to attempt to marshal and present such evidence. Thus, rather than place the burden of "uncertainty" on the wrongdoers to bear the risk of imprecision as to the amount of injury caused by their antitrust violation, the Court of Appeals forced petitioner—the innocent victim of the antitrust conspiracy to bear the risk of potential uncertainty. Thus, because the economic damage to the State of Hawaii as *parens patriae could possibly* be difficult to measure, the State is denied the right to maintain the action.

Unfortunately, on the state of the present record—a decision on the pleadings alone—we can only speculate as to what type of relevant economic data would be presented at trial to provide the jury with a basis for making a reasonable estimate of the damages suffered by the State as *parens patriae*. It must be remembered that the civil damage action is such an essential and integral part of national antitrust enforcement policy that this Court has recognized that such a suit will not fail merely because the precise amount of damages is difficult to ascertain. Monopolists cannot be allowed to go free and enjoy the profits of their illegal conduct merely because their conspiracy was so effective and persuasive that damages are difficult to measure. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow v. R.K.O. Radio Pictures, Inc., supra; Zenith Radio Corp. v. Hazeltine Research, Inc., supra;* see also: *Washington*

State Bowling Prop. Ass'n. v. Pacific Lanes, Inc., 356 F.2d 371, 379 (9th Cir. 1966).

In fact, the Court of Appeals was completely erroneous in its belief that evidence is not available to formulate a reasonable estimate of the amount of damage suffered by the State of Hawaii as a result of the flagrant price-fixing agreement alleged here. One commentator, in addressing himself to our present case of alleged price-fixing in the oil industry, has articulated at least one specific way in which the antitrust violation here alleged has caused tangible economic injury to the State of Hawaii. The price increase caused by the respondents' price-fixing conspiracy could well be shown to have reduced the demand for and total consumption of motor gasoline thus directly affecting the tax revenues (assessed per gallon of gasoline sold) collected by the State of Hawaii. 6 Columbia Journal of Law and Soc. Problems at pp. 414-417.

Indeed, such information as the amount of overcharge per gallon of gas, which occurred by reason of the price-fix, multiplied by the number of gallons sold in the State of Hawaii during the time period here involved would be relevant economic data for the jury to consider. If anything damages so estimated would be an *understatement* of the actual general injury to the economy of Hawaii, but would insure, at least, a return of the illegally extracted funds.

In addition, the testimony of expert economists would provide enlightenment. In the final analysis, then, the standing of the State of Hawaii to maintain this present action under Section 4 of the Clayton Act is governed

by the cases discussed above and summarized by this Court's observation in *Continental Ore, supra:*

> "Where plaintiff proves a loss, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that *the jury,* as the trier of the facts, *must be permitted to draw from this circumstantial evidence* the inference that the necessary causal relation exists." *Continental Ore Co. v. Union Carbide & Carbon Co., supra,* 370 U.S. at p. 697. (Emphasis added.)

D. The Court of Appeals Erroneously Ruled that the Injury to the State of Hawaii Was so Incidental, Remote and Indirect as to be Outside the "Target Area" of Respondents' Antitrust Violation.

The Court of Appeals below stated that, even if it accepted the notion of injury to the economy of a State as a result of an antitrust violation as alleged here, ". . . such injury is indirect and consequential. . . ." The Court of Appeals went on to state that "It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act", citing many of the so-called "target area" cases such as *Bookout v. Schine Chain Theatres, Inc.,* 253 F.2d 292 (2nd Cir. 1958); *Melrose Realty Co. v. Loew's, Inc.,* 234 F.2d 518 (3rd Cir. 1956); *cert. denied,* 352 U.S. 890 (1956); *Loeb v. Eastman Kodak Co.,* 183 Fed. 704 (3rd Cir. 1910); *Productive Inventions, Inc. v. Trico Products Corp.,* 224 F.2d 678 (2nd Cir. 1955). These decisions and others indicate that when an antitrust violation is "aimed at" a particular class of victims, the shareholders, lessors, creditors and others who are "outside that area of the econ-

omy endangered'' by the violation have no standing to maintain an action under Section 4 even though they suffered injury.

Initially, the Court below failed to recognize that this ''target area'' concept is a somewhat artificial limitation upon an antitrust plaintiff's standing to sue and one which runs counter to the national policy in favor of vigorous private enforcement procedures. See the numerous decisions and quotations of this Court set out in the Argument, above: *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., supra; Radovich v. National Football League, supra; Perma-Life Mufflers, Inc. v. International Parts Corp., supra; Lawlor v. National Screen Service, supra.* This Court has never approved of the ''target area'' limitation. 64 Colum. L. Rev. 570, 585 (1964).

The Court of Appeals decision below, and the cases it relied upon, reflects an ''anti-antitrust'' attitude which this Court has repeatedly and consistently condemned. The ''target area''—''indirect injury'' rulings as exemplified by the lower court's ruling herein, demonstrate an unwillingness on the part of some courts to enforce the clear policy and spirit of the federal antitrust laws as intended by Congress and consistently and uniformly construed by this Court. Instead of an important device for enforcing our national economic policy in favor of fair, free and robust competition, these courts regard the private treble-damage action as a ''windfall'', the availability of which should be restricted rather than encouraged. See: *Snow Crest Beverages v. Recipe Foods,* 147 F.Supp. 907 (D. Mass. 1956).

In *Radovich, supra* (352 U.S. at 453-454) this Court specifically disapproved of such formalistic and artificial limitations:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade', Times-Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

The Court of Appeals below also failed to recognize or even address itself to the more recent and enlightened line of "target area" cases which have established that a plaintiff is within the endangered area of the economy, and thus has standing to sue under Section 4, if it could reasonably be foreseen that the plaintiff would be affected by the illegal conduct. *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970); *South Carolina Council of Milk Producers v. Newton, supra.* Ironically, it has been the Ninth Circuit itself which has led the way toward the more enlightened view of standing. In *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964) the Ninth Circuit Court ruled that:

> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather it was intended to express

the view that plaintiff must show that, whether or not then known to the conspirators, *plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy.*" (328 F.2d at 220). (Emphasis added).

See also: *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967) and *Mulvey v. Samuel Goldwyn Productions, supra.*

In *Georgia v. Pennsylvania R. Co., supra,* this Court made it clear that a widespread and pervasive private antitrust conspiracy aimed at businessmen or consumers within a particular State causes an independent injury to the State itself. In our case, the State of Hawaii and its citizen-consumers of petroleum products were the specific targets of the respondents' anti-competitive conspiratorial conduct. Because of Hawaii's relatively isolated geographical location, the State and its citizens became easy prey for the respondents. The complaint clearly alleges that the illegal price-fixing by respondents directly resulted in a discriminatorily inflated price structure being imposed for petroleum products within the State of Hawaii. Thus, under the *Georgia* case, respondents must be held to have been reasonably able to foresee that their illegal conduct would adversely affect the Hawaii economy.

Therefore, even if this Court accepts the "target area" limitation on standing, the injury to petitioner here was of the type that could reasonably have been foreseen by respondents to have resulted directly from their illegal conduct. Indeed, it must be seen that the State of Hawaii

and its marketplace *was* the geographic area of the economy which was the precise "target area" endangered ("aimed at") by respondents' price-fixing conspiracy.

This Court has recently had occasion, in a different context, to consider the standing of a party to sue under federal statutes. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). In *Data Processing*, this Court articulated two general standards for determining the propriety of a plaintiff's standing:

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." (397 U.S. at 152.)
>
> "[The second question is] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.... That interest, at times, may reflect 'esthetic, conservational, and recreational' as well as economic values. *Scenic Hudson Preservation Conference v. FCC*, 354 F. 2d 608, 616; *United Church of Christ v. FCC*, 359 F. 2d 994, 1000-1006. . . . We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioner relies here. Certainly he who is 'likely to be financially injured', *Commission v. Sanders Radio Station*, 309 U.S. at 417, may be a reliable private attorney general to litigate the issues of the public interest in the present case." (397 U.S. at 153-154.)

In stating the requirements for standing in *Data Processing* and *Barlow*, *supra*, the Court recognized that whether plaintiffs can in fact prove injury adequate to

support recovery relates to the *merits* of their claim, not to the preliminary question of standing. Such issues are pertinent only to the damage aspects of these cases, and have no relevance to standing to sue. And, when it comes to the issues of damages, this Court has been most specific in demanding that an antitrust plaintiff be given full opportunity to establish—*before the jury*—the nature and extent of the economic injury suffered as a result of the illegal anti-competitive conduct charged. *Bigelow v. R.K.O. Radio Pictures, Inc., supra.*

Thus, even if the "target area" and "indirect injury" considerations are accepted by this Court as limitations on the standing of civil antitrust plaintiffs, the State of Hawaii has clearly met and satisfied such requirements herein. Respondents' price-fixing conspiracy was aimed at the State of Hawaii, its market, its economy, and its consumer-citizens. It was reasonably foreseeable—under *Georgia v. Pennsylvania R. Co.*—that the economic well-being of the State of Hawaii and its citizenry would be adversely affected in a significant way by such a pervasive conspiracy in the important oil and petroleum industry. Therefore, the ruling of the Court of Appeals below dismissing petitioner's *parens patriae* claim because any injury so suffered was indirect and outside the "target area" of the alleged price-fixing conspiracy must be reversed.

IV. THE STATE OF HAWAII, IN ITS CAPACITY AS PARENS PATRIAE, SHOULD BE PERMITTED TO MAINTAIN THIS ACTION UNDER SECTION 4 OF THE CLAYTON ACT AS THE REPRESENTATIVE OF ITS CITIZENS.

Primarily, the position of the petitioner herein, consistent with the theory underlying *Georgia v. Pennsylvania R. Co., supra,* is that the respondents' pervasive conspiracy caused an injury to the economy of the State of Hawaii, which injury is separate and independent from the harm caused to the various individual consumers. Under *Georgia*, the injury to the economy must be viewed as an injury to a legally protected economic interest—"property"—which Congress intended to protect through Section 4.

In addition, the *Georgia* case recognized the standing of the State as *parens patriae* to represent and protect its citizenry—or a substantial portion thereof. Thus, there exists an additional and alternative basis for permitting the State of Hawaii to maintain the present action as *parens patriae*. In the words of the amended complaint: petitioner brought ". . . this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages . . ." (App., p. 64.) This rationale, when read in the light of the national policy favoring antitrust enforcement through the civil damage action clearly supports the propriety of the present suit and the standing of the State of Hawaii to recover damages as *parens patriae*. See, *Report of the Task Force on Productivity and Competition*, George J. Stigler *et al.*, Antitrust Law & Economics Review, Vol. 2, No. 3, Spring 1969.

Historically, it has been recognized that the State as *parens patriae* may bring civil actions as the *representative* of its citizens and to remedy wrongs committed against a substantial portion of them. In our case, the injury to hundreds of thousands of consumer-citizens is tantamount to an injury to the public at large. Accordingly, the State is the proper party to redress that injury.

This Court has historically recognized the propriety of the State suing private wrongdoers as the representative of its injured citizens. *Georgia v. Tennessee Copper Co., supra.* In *Missouri v. Illinois,* 180 U.S. 208, 241 (1901) the Supreme Court stated that ". . . if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." In *New York v. New Jersey,* 256 U.S. 298 (1921) the Court stated:

> "The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, *the State is the proper party to represent and defend such rights.* . . ." (at 301-302) (Emphasis added.)

Moreover, an adequate state interest is present to support a suit *parens patriae* whenever a substantial portion of the State's citizens have an interest in the controversy.

In *Kansas v. Colorado,* 185 U.S. 125, 142 (1901) the Supreme Court entertained an action *parens patriae* holding that a State had the right to invoke its original jurisdiction "as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens . . ." In *Land O'Lakes Creameries v. Louisiana,* 160 F.

Supp. 387 (E.D. La. 1958), a three-judge Court expressed the standard with regard to "a substantial number" of a State's citizens.

Significantly, the same theory was advanced by the State in its second count in *Georgia v. Pennsylvania R. Co., supra.* As noted previously, Georgia sought damages of at least $5,000,000.00 under these alternate theories of *parens patriae* recovery. In its opinion this Court observed that, as *parens patriae,* the State could utilize the remedies under the antitrust laws to redress injuries to its economy or to the well-being of its citizenry at large and seemed clearly to imply that the State could have recovered damages but for the Interstate Commerce Commission anti-rebate policy.

Moreover, it should be noted that in the landmark *parens patriae* case of *Georgia v. Tennessee Copper Co., supra,* this Court ultimately entered a decree which included a provision that the Tennessee Copper Co. ". . . undertook annually to supply a fund to compensate those injured by fumes from its works . . ." 237 U.S. 474, 476 (1915).

The argument made by respondents herein, and accepted by the Court of Appeals below, when taken to its logical conclusion, is that although they illegally conspired to inflate the prices for their products and although this pervasive artificial pricing structure occurring in the major and socially important oil industry injured the economy of the State of Hawaii and illegally extracted large sums of money from the citizen-consumers in that State, the wrongdoers are entitled to retain their illicit profits and defeat the efforts of the State as *parens*

patriae to obtain remedial compensation for either the injury which was inflicted upon the economy and well-being of the State, or the injury inflicted upon the hundreds of thousands of citizen-consumers who are without an otherwise effective and available remedy. The law has never been, and need never be, so blind and helpless in the face of such monumental illegality and wrongdoing. Compare: *In Re Permian Basin Area Rate Cases,* 390 U.S. 747, 825-828 (1968); *Wisconsin v. F.P.C.,* 373 U.S. 294 (1963); *California v. F.P.C.,* 296 F.2d 348 (D.C. Cir. 1961); *Guam v. Fed'l Maritime Comm.,* 329 F.2d 251 (D.C. Cir. 1964). Indeed, even taking the most narrow and limited view of the language of Section 4 of the Clayton Act, the numerous *parens patriae* cases cited above recognize that the State of Hawaii here has, as one of its most important aspects of "business", the task of protecting the safety, welfare and property of its citizens, providing essential services, and promoting the economic development and prosperity of the community at large. To the extent that the conspiracy here alleged against respondents detracted from the State's ability to perform this important business function, then, the State of Hawaii was injured and has standing to remedy that injury to its business under Section 4.

In light of *Georgia,* and under the historically recognized right of the State of Hawaii to protect the interests of hundreds of thousands of consumers of petroleum products, then, petitioner must be allowed to recover the amount of damages which respondents illegally extracted from the otherwise remediless citizen-consumers. In its *parens patriae* capacity, the State of Hawaii may be

awarded such damages as trustee and representative of the citizens. The damages recovered thus will be held and utilized for the benefit of the citizens at large.

Inasmuch as the injury to the citizen-consumers was to their "property" in the traditional sense of that term, the State as *parens patriae* is representing such citizens in that interest. Thus, it must be recognized that the State of Hawaii is seeking damages for specific monetary-property losses which it has a right to collect in its *parens patriae*-trustee capacity.

Moreover, under this theory of recovery, the respondents' contentions as to the alleged difficulties in the measurement of damages fails completely. The State, as *parens patriae,* could recover the total amount of the excess price—the illegal overcharge—which resulted from respondents' price-fixing conspiracy.

Therefore, where, as here, the hundreds of thousands of consumers injured by respondents' pervasive illegality cannot effectively protect themselves, the State must be permitted to represent them. The public purposes and policies which favor the liberal availability of the Section 4 damage remedy in promoting national antitrust enforcement cannot survive decisions such as that of the Ninth Circuit below. *Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra.* The State of Hawaii as *parens patriae* must be permitted to act as representative and trustee to recover damages on behalf of its injured and otherwise remediless citizen-consumers. Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo. Wash. L. Rev. 1031 (1969). So construed, the *parens patriae* action would become the most effective and soci-

ally desirable means for remedying major antitrust violations such as the one alleged herein. *Wrongs Without Remedy,* 43 So. Cal. L. Rev. 570, 594-595 (1970). In the final analysis, such a decision would be good law, good policy and good sense.

CONCLUSION

For the foregoing reasons, the State of Hawaii respectfully requests that this Honorable Court reverse the ruling of the Court of Appeals below, and order that petitioner's claim as *parens patriae* be reinstated.

Dated: April 14, 1971.

Respectfully submitted,

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October Term, 1970

No. ~~1060~~ 70-49

STATE OF HAWAII,

Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA; UNION OIL COMPANY OF CALIFORNIA; SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY,

Respondents.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 1060

STATE OF HAWAII,

Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA; UNION OIL COMPANY OF CALIFORNIA; SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY,

Respondents.

BRIEF OF AMICUS CURIAE

Introduction

The State of California files this amicus curiae brief in support of Hawaii pursuant to Rule 42 of the Rules of this Court.

This Court in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), held that a state could sue *parens patriae* to recover for damages to the economy under the antitrust laws.

The facts alleged in the present case and those presented in *Georgia, supra,* are similar. In each case the state sued as *parens patriae* alleging a price-fixing conspiracy and in each case the state sought to recover for similar types of damages to the economy.

Notwithstanding *Georgia v. Pennsylvania R. Co., supra*, the Ninth Circuit held that Hawaii, as *parens patriae*, could not sue under Section 4 of the Clayton Act to recover damages to its general economy. Hawaii's petition for certiorari from this decision has been granted. Amicus supports Hawaii's contention that the opinion of the Circuit Court in denying this cause of action conflicts with the holding by this Court in *Georgia* and impairs the purpose of the antitrust laws.

Pursuant to the Congressional policy of encouraging private law enforcement of the antitrust laws California, and other states, have brought treble damage and injunctive actions to enforce these laws. In doing so, it has become evident that the type of harm capable of being done by those who violate the antitrust laws results in damage not only to specific persons (including states in their proprietary capacity) but also to the mass of consumers, as well as to the general economy and welfare of the state.

Under such circumstances, states have begun utilizing the *parens patriae* concept in order to fully recover for the harm done by violators of the antitrust laws. Perhaps the most notable are the automobile air pollution cases brought by California and other states,[1] against the automobile manufacturers alleging a conspiracy to delay the development and installation of smog devices on automobiles. The very issue before this

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[1]Approximately 34 states have filed lawsuits, all of which have been consolidated for pre-trial proceedings in the United States District Court for the Central District of California. *In re Multidistrict Vehicle Air Pollution*, M.D.L. No. 31.

Court is presently pending on interlocutory appeal before the Ninth Circuit in the air pollution cases.

The decision by this Court on the question of *parens patriae* is therefore of great importance to not only pending cases, but to the future role of states in their enforcement of the antitrust laws.

Hawaii has also raised in its brief the bringing of a *parens patriae* cause of action to recover damages as representative of the consumers in Hawaii (Hawaii's Brief, pp. 62-67). There are presently pending in federal courts other antitrust cases which states have brought alleging *parens patriae* representation of consumers, the most notable being the broad spectrum antibiotic drug cases brought by amicus and other states. California agrees with Hawaii that such a cause of action is proper in antitrust cases.

Unless reversed, the *Hawaii* decision will adversely effect the ability of states to recover for injuries resulting from violations of the antitrust laws and will severely curtail the Congressional policy of encouraging private law enforcement of antitrust violations.

Nature of Case

The nature of the case has been set forth in detail in Hawaii's brief. Briefly, Hawaii's complaint alleged that the defendants conspired to fix the price of gasoline and other products sold in the State of Hawaii.

Count One alleged a cause of action by the state suing in its proprietary capacity. This cause of action is not before the Court.

Count Two was brought ". . . by virtue of its [Hawaii's] duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws, hereinbefore alleged." (Hawaii's Brief, p. 8.) This count alleged that the conspiracy of the defendants injured and adversely affected the economy and prosperity of the State of Hawaii.

Count Three sought recovery pursuant to Rule 23 of the Federal Rules of Civil Procedure as representative of a class comprised of all purchasers of the defendants' gasoline and other refined petroleum products.

The District Court sustained Count Two but dismissed Count Three. The dismissal was not appealed by *Hawaii.* The Court of Appeals reversed the District Court in regard to Count Two from which decision Hawaii's petition for certiorari has been granted.

ARGUMENT

I

Hawaii, as Parens Patriae, States a Cause of Action for Damages to Its Economy Under Section 4 of the Clayton Act

In dismissing Hawaii's cause of action to recover as *parens patriae* for damages to the economy the Ninth Circuit found that the general economy was an abstraction and had no value in itself. The Court went on to state that even if injury to the economy could be measured, it was not an injury to business or property within the meaning of Section 4 of the Clayton Act, and furthermore, the injury was too indirect and remote to permit recovery. The Circuit Court erred in these conclusions.

A. The Economy Was Not Held to Be an Abstraction in Georgia v. Pennsylvania R. Co.

The injury and damages set forth in Count Two of Hawaii's complaint are similar to those alleged in the *Georgia* case. The Ninth Circuit was concerned with Hawaii's inability to articulate a precise measure of damages and found that the economy was an abstraction for which no damages could be recovered.

This Court, however, had no problem with the economy being an abstraction when it decided that Georgia could allege an action for damage to its economy under the antitrust laws.

> ". . . The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. . . . And we find no indication that,

> when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts."
>
> *Georgia v. Pennsylvania R. Co., supra*, at p. 447.
>
> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil sanctions of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail."
>
> *Georgia v. Pennsylvania R. Co., supra*, at p. 452.

The civil sanctions of the antitrust laws provide for means of relief by both injunction and damages (Section 4 and Section 16 of the Clayton Act). If an illegal act did indeed occur, resulting in injury to Hawaii's economy, then Hawaii should not be deprived of its statutory right to seek and prove damages.

This Court made it clear that it denied Georgia's action for damages only because the injury was based on discrimination in railroad rates and tariffs. Such a recovery was precluded by *Keogh v. C. & N. W. Ry. Co.*, 260 U.S. 156 (1922), a case which held that private antitrust damage actions cannot be brought in regard to rates approved by the Interstate Commerce Commission.

Nowhere in *Georgia* did this Court hold that a state may not sue to recover for damages to the economy. On the contrary, that decision specifically stated that a state, suing under the civil sanctions of the antitrust laws, could state a cause of action for such damages.

As to requiring a precise measure of damage, Hawaii should not be compelled to establish its proof at the pleading stage. Under the liberal rules of pleadings in antitrust cases, all Hawaii need do to withstand a motion to dismiss was allege a violation of Section 1 of the Sherman Act and that it was damaged thereby. *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656, 660 (1961). This it has done.

By its action the Court failed to distinguish between the fact of damage and the measure of damage. The fact of damage alleged by Hawaii paralleled that asserted in the *Georgia* case and Hawaii should not have been precluded at the pleading stage from the opportunity of proving damages at trial. If Hawaii can in fact prove that its economy has been damaged, uncertainty as to the amount of damage should not prevent recovery. *Bigelow v. RKO Radio Pictures*, 327 U.S. 252 (1946).

B. Injury to Business or Property

Even if damages to the economy could be measured, the Ninth Circuit stated that such injury does not constitute injury to business or property within the meaning of Section 4 of the Clayton Act. In recognizing the right of a state to sue under the antitrust laws for damages to its economy this Court stated:

> ". . . Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate."

Georgia v. Pennsylvania R. Co., supra, at p. 451.

The interests that Hawaii seeks to protect are the same as those alleged by Georgia which were recognized by this Court as being legitimate interests subject to the protection by a state under the antitrust laws. In finding that Hawaii was not injured in its business or property the Circuit Court narrowly interpreted the meaning of these words.

There is no simple definition of the terms "business or property". Nor, in our rapidly changing society, should the courts attempt a definition which purports to describe for all time exactly what constitutes "business or property".

In *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964), the court noted that the words "business or property" are used in the disjunctive and that "property" has wider scope and is more extensive than the word "business".

> ". . . If it is decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses 'property.' "
>
> *Waldron v. British Petroleum Co., supra*, at 86.

This Court has time and again held that a state has sufficient interest to bring lawsuits for the purpose of protecting the health, comfort and general welfare of its people. *Penna. v. West Virginia*, 262 U.S. 553 (1923); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). Whether it be deemed "business" or "property," the interest of Hawaii in protecting its economy and the general welfare of its people is certainly subject to judicial protection within the meaning of Section 4 of the Clayton Act.

C. The Injury to Hawaii Was Not Remote

In dismissing Count Two the Ninth Circuit found that the injury to the economy was too remote. The remoteness test is one which has been self-imposed by lower courts and is not a criteria contained in the antitrust laws. In fact, this Court in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), reversed a decision by the Ninth Circuit where the Circuit Court denied a jury verdict for petitioner on the ground that the injury suffered was too remote[2] from the unlawful activity to permit recovery.

Moreover, in the remoteness cases denying an action to a particular plaintiff which were relied upon by the Ninth Circuit, there was always a party with a more proximate injury who was available to bring the action. The specific injuries alleged by Hawaii to its economy clearly reveal that they were not remote and certainly there is no more appropriate party than Hawaii to bring this action.

In spite of the similarities with *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), the Ninth Circuit found that injury to the economy was too remote and held as a matter of law that Hawaii could not bring a *parens patriae* action to recover for damages. This decision not only conflicts with *Georgia*, but fails to recognize the propriety of a *parens patriae* action by a state for damage to its economy where facts clearly reveal an impact upon a state's economy which is not remote. One good example is the air pollution case where the conspiracy involved not ordinary price fixing but a

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[2]The Court of Appeals described Perkins' injury as "fourth level" since he claimed injury from a competitor who was the "third" purchaser of the gasoline sold by Standard Oil. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 647 (1969).

conspiracy which, as a natural consequence, injured the economy.

Unless reversed, the Hawaii decision would preclude the bringing of a *parens patriae* cause of action by a state to recover for damage to its economy regardless of the facts constituting violations of the antitrust laws.

II

Suits by a State Parens Patriae in Conspiracies Effecting Consumer Goods Are Essential for the Fulfillment of the Enforcement of the Antitrust Laws

A. Introduction

Amicus supports the contention raised by *Hawaii* that in a conspiracy injuring a large number of consumers, who will otherwise be unable to present their damage claims, a state has a proper role to sue *parens patriae*.

It is well established that in permitting treble damage actions the intent of Congress was to encourage the private law enforcement of antitrust violations. To the extent that private antitrust enforcement is thwarted, because of the type of violation, the effect of these laws becomes diluted.

The best example of where antitrust violations may occur without fear of punishment, and reap large returns to the violators, are those conspiracies which injure a large group of consumers and involve small purchases. Most consumers injured by such a conspiracy will not recover either on an individual or class action basis thereby enabling the defendants to retain their unlawful profits.

Consistent with the private antitrust enforcement policy, states should have *parens patriae* standing to present evidence of total consumer purchases in antitrust actions

based on violations involving consumer goods. In addition to policy factors requiring this result, the historical precedents regarding *parens patriae* are consistent with this approach. The doctrine was created and applied to deal with situations in which, but for this concept, there would be no remedy for illegal acts.

The doctrine of *parens patriae* originated when the sovereign was granted the right to represent its citizens who were *non sui juris*. It was subsequently used to allow the sovereign to sue when all, or substantially all, of its citizens had been injured. Permitting a state to sue *parens patriae* in antitrust cases where its citizens have been injured in a manner which realistically precludes them from bringing their own actions is another logical application of the *parens patriae* doctrine.

B. This Court Has Recognized Treble Damage Actions as a Means of Private Enforcement of the Antitrust Laws

In the case of *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 130-31 (1969), Justice White stated:

> "Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. . . ."

Vigorous private enforcement of the antritrust laws has repeatedly been recognized as being "a bulwark of antitrust enforcement." *Perma Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968).

The essence of private enforcement has been the establishment of procedures which warn those who violate the antitrust laws that they will have to pay damages equal to three times the amount of damages caused by their unlawful activities. If there is no like-

lihood that treble damage actions can be successfully brought against those who violate the laws, the deterrent effect of private enforcement actions will necessarily be severely diminished. Thus, the permitting of *parens patriae* actions in consumer conspiracies is consistent with the purpose of permitting private enforcement of the antitrust laws.

C. The Great Bulk of Consumer Claims Will Not Be Presented in a Traditional Antitrust Case Involving Consumer Goods

The possibility of violations of the antitrust laws relating to consumer goods is apparent.[3]

The very nature of consumer goods is such that the possibility of successful treble damage actions is small. The facts in the instant case clearly demonstrate the problems involved in bringing a successful treble damage action in relation to consumer goods. Even with a product such as gasoline which is purchased on a regular basis, and in which purchases may amount to several hundred or even several thousand dollars for an individual consumer during a conspiracy of several years, it is not realistically possible due to the notorious expenses of suit for consumers to bring individual actions.

Even if a traditional class action was established, it would not resolve the problem of presenting the claims of all consumers if each individual class member is required to prove his individual purchases in order to recover damages. It is apparent that when this procedure is used the defendants will not be required to pay dam-

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[3]Recent cases relating to consumer goods have involved tetracycline, ampicillin, benzothiadizaine, eggs, gasoline, quinidine and potato chips.

ages based on all sales. The realities of life are that: (a) it is simply impossible to get everybody in a large consumer class to participate in a class action; (b) even among those who desire to participate the ability may be lacking because of such things as missing records to prove purchases; and (c) in relation to conspiracies in certain products, such as drugs, the consumer will frequently not even know that he purchased the product in suit. The result is that even if a class is established, most of the claims involved will not be presented.[4]

In cases involving consumer goods, such as eggs or potato chips, it is apparent that most consumers will not have actual proof of purchases. Even in those situations involving commodities where there may be documents to prove purchases, such as credit card slips for the purchase of gasoline, the proof of purchase will often have disappeared. The result is that if a conspiracy injures consumers and it is necessary to present records of purchases to prove damages it will be difficult, if not impossible, for most members of a class to recover. The defendants, therefore, will not be penalized by being separated from their illegal profits and hence the alleged deterrent effect of treble damage actions will not exist in relation to conspiracies involving consumer goods.

It is true that the doctrine established in the case of *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481 (1968) may resolve this problem on occasion by providing that the cause of action resides with a party

[4]It is noted that in the Second Circuit decision approving the settlement reached by certain plaintiffs in the broad spectrum antibiotic cases only 38,000 claims were received from 43 settling states, despite the fact that obviously millions of people used the drug in question. *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970).

who can realistically bring a treble damage action. This could be the manufacturer, wholesaler, or some other party in the line of distribution. However, it is equally true that there may well be consumer situations which fall within the exception set forth in *Hanover* regarding situations analogous to "cost plus contracts."

Such a situation is exemplified by the broad spectrum antibiotic drug cases. In those cases the product which was the subject of the conspiracy passed unchanged in form through the chain of distribution. Each level included a price markup. This marketing process is analogous to a "cost plus contract" in that it can be easily proven that the original overcharge was passed on to the consumer. This method of pricing is normal within consumer markets.

In addition, as illustrated by the instant case, there may be no independent intervening parties between the violator and consumer since the defendant Standard Oil sells through their own retail outlets and the consumer directly pays the amount of the alleged illegal overcharge.

D. - If Consumer Claims Are Not Presented, There Can Be No Effective Private Enforcement

If it is assumed that only a small portion of the claims in an antitrust consumer conspiracy will be presented in a traditional class action, then although damages are trebled the defendants will not even be required to pay full single damages. Unless a state is permitted as *parens patriae* to present evidence of total purchases so that full damages can be assessed, the defendants will retain their illegal profits and have achieved the goals intended by their unlawful conspiracy. The entire thrust of treble damage actions to provide effective private enforcement would thus be negated.

III

The Origins and Development of the Common Law Doctrine of Parens Patriae Justify Its Application to Treble Damage Actions Involving Consumer Claims

The origin of the common law doctrine of *parens patriae* and its subsequent development by the courts indicate that it is an appropriate and ideal legal vehicle to use in presenting claims of consumers injured by antitrust violations in consumer markets.

A. The Doctrine of Parens Patriae Originated in the Authority of the Sovereign to Represent Persons Who Are Non Sui Juris

In early English common law, idiots, incompetents and infants were *non sui juris*. Because the individual incompetent was unable to appear in court, the legal doctrine of *parens patriae* was developed. This doctrine provided that the sovereign through its attorney general could represent all persons who were *non sui juris*. See *Attorney General v. Dublin (Mayor of)*, 1 Bligh N.S. 312 (1827), 4 Eng. Rep. 888 (1901); *Shaftsbury (Earl of) v. Shaftsbury*, Gilb, Rep. 172 (1725), 25 Eng. Rep. 121 (1903).

The need for such a legal doctrine is clear. The government could not permit a situation in which, for example, an incompetent could have his property converted but because he was *non sui juris* no one could bring an action in conversion. The law allowed the sovereign to stand in a representative capacity on behalf of the person who was *non sui juris*.

The crucial elements regarding the origin of *parens patriae* in relation to the instant case are: (1) it is a

common law doctrine and therefore subject to expansion and development by this common law court; (2) it is an interstitial doctrine designed to fill a gap in the law where the need for such gap filling is obvious; and (3) the state in bringing an action *parens patriae* was not bringing it to recover for injury done to the state itself.

B. The Parens Patriae Doctrine Has Been Applied to Allow States to Represent Large Masses of Its Citizens

In the United States the doctrine of *parens patriae* hase been used by states to bring actions in situations where the mass of their citizens were injured or threatened. In these cases, the action is not brought on behalf of an individual person who is *non sui juris*, but is brought on behalf of an amorphous mass of citizens. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 451 (1945). The requisite element for the state bringing *parens patriae* action in these cases was the existence of an injury to a large number of its citizens. Most of these actions were invariably injunctive in nature. The state in its capacity as *parens patriae* would seek to enjoin some deleterious activity, not because it was injuring the state in its proprietary capacity, but because it was injuring or threatening to injure its citizens. These were situations in which it would have been unreasonable and impractical to expect any one citizen to bring an action because of the magnitude of the problem and because no one citizen's injury was markedly different from that of any other citizen.

C. Parens Patriae Should Be Developed to Permit the State to Present All Antitrust Claims Based on Consumer Sales

The fundamental issue presented by the consumer representation aspect of this case is that absent such representation an antitrust conspiracy can cause injury to vast numbers of consumers and damage claims will not be made for such injuries. To this extent, the present case is quite analogous to those cases permitting *parens patriae* actions where there has been injury to one who is *non sui juris*—or to a large number of persons—who are unable to sue on their own behalf.

In permitting *parens patriae* by a state in antitrust cases, as representative of its consumer citizens, damage claims of consumers who do not otherwise present their claims can be brought before the court and result in separating the defendants from their illegally obtained profits. The idea that a person should have freedom to injure others and remain immune from civil actions is abhorrent to any legal system. Thus, the application of *parens patriae* actions in consumer conspiracies is consistent with the purpose and development of the doctrine of *parens patriae*.

D. Parens Patriae Is a Common Law Doctrine Properly Subject to Development by the Courts

The concept of *parens patriae*, as a common law doctrine is properly subject to development by the courts. In describing the need to develop the common law former Chief Justice Roger Traynor of the California Supreme Court stated:

". . . Our responsibility was . . . to create the most rational rule possible for a novel situation, almost but not quite covered by a statute."

"Statutes Revolving in Common Law Orbits," 43 Cal. B.J. 509, 531-532 (1968).

It has been argued that changes in the law in relation to *parens patriae* should be directed to Congress rather than the courts. This is, of course, an argument made by defendants at all times when attempting to stop developments of the law which they find antithetical to their interest. While Congress may act if it feels it appropriate, the courts nevertheless have the right to develop the doctrine. The right of courts to keep the common law viable was noted by Chief Justice Traynor stating:

"Confronted with a moribund rule that was patently awaiting a coup de grace, we noted that the rule had been judicially created in the first place and hence it would be inappropriate to await its undoing by the Legislature. 'In effect the contention is a request that courts abdicate their responsibility for the upkeep of the common law. That upkeep it needs continuously, as this case damonstrates.'" "Statutes Revolving in Common Law Orbits," *supra*, at 524.

IV

The Bringing of Parens Patriae Actions Is a Function of the Sovereign but They Are Not Necessarily Brought on Behalf of the Sovereign

The right of a state to sue as *parens patriae* has created a great deal of confusion, both conceptual and semantic. The confusion is, however, susceptible to resolution upon a careful analysis of the cases and consideration of the concepts involved.

The requisites for a state filing an action *parens patriae* are not the same as those required for a state suing in a quasi-sovereign capacity. The belief that a state must have an interest independent of and behind the title of its citizens applies only when the suit concerns quasi-sovereign interests. To sue in a *parens patriae* capacity, however, there need not be any injury to the state itself and the need for injury to "business or property" under Section 4 of the Clayton Act is satisfied if such injury has occurred to those who are represented in the *parens patriae* action.

A. Suits in a Quasi-Sovereign Capacity

A state can bring an antitrust action in its sovereign capacity to recover for injuries suffered as a sovereign. *Georgia v. Evans,* 316 U.S. 159 (1942). In such a situation, the state is comparable to a citizen suing to recover for injuries to the citizen caused by an antitrust conspiracy. The instant case is, in part, such an action. Hawaii has sued to recover damages for injury in its proprietary capacity resulting from price fixing on gasoline purchased for use in state cars. The injury has been suffered by the State, qua State, and any damages recovered are to be retained by the State.

The quasi-sovereign capacity of a state is less clear. The concept is specifically mentioned in *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907), where Georgia sued to enjoin the emission of noxious gases which were emitted by a company in a neighboring state and were carried into Georgia. Justice Holmes stated:

> "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit

between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads." 206 U.S. at 237.

While a state can bring an action in its capacity as sovereign for injury to property owned by the state, in *Tennessee Copper* it was not injury to the state's property that was the basis of the action. But, ". . . the State has an interest independent of and behind the titles of its citizens. . . . It has the last word as to whether its mountains shall be stripped of their forests . . . It might have to pay individuals before it could utter that word, but with it remains the final power." Quasi-sovereignty is then, at least in part, the residual interest of the state in all the real property within the state. As Justice Holmes notes, the state "has the last word" regarding usage of property within the state. "It might

have to pay" (*i.e.*, condemn the property) but it has the last word.

Thus, under *Tennessee Copper* a state may sue in a quasi-sovereign capacity to protect its residual interests. Of particular importance in this decision is the fact that it was the state interest that was being protected by the state. The state was not suing to protect the property of individuals even though it may have been a necessary incidental effect of the suit. Since the state was suing to protect its own interest in property, it necessarily had to have an interest to protect—thus the statement "a State has an interest independent of and behind the title of its citizens."

B. Suits by a State Parens Patriae

In evaluating the requisites of a *parens patriae* suit the nature of a quasi-sovereign suit must be distinguished. Acting as *parens patriae* is one of the functions of sovereignty, but in suing as *parens patriae* a state does not necessarily sue to recover damages for injuries suffered by the state. Rather, the state sues *parens patriae* as a representative of persons who have been wrongfully injured but cannot realistically sue on their own behalf.

Thus, there is no need for a state suing *parens patriae* to have an interest independent of and behind the title of its citizens. In *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), this Court, first directing its attention to whether Georgia could sue *parens patriae* under the antitrust laws determined that it could

bring such an action because the civil remedies were not intended to restrict states to protecting only their proprietary interests. In holding that a state could sue *parens patriae* this Court properly made no reference to the requisite that a state have an interest independent of and behind the title of its citizens.[5]

The state in suing as *parens patriae* acts as a "trustee, guardian or representative of all her citizens." *Louisiana v. Texas*, 176 U.S. 1, 19 (1900). Acting in this capacity, it is no more necessary that the state have suffered an injury than it is necessary that a guardian be personally injured before he can sue on behalf of his ward.

This fact is important in applying the requirement of Section 4 of the Clayton Act that a plaintiff be injured in his business or property. Since the state is suing on behalf of persons who will not be filing their own claims, the court should look to the represented parties to see if they have been injured in their business or property. Where a state is suing *parens patriae* to recover for over-charges to a consumer class, there can be no doubt that there was injury to the "business or property" of those consumers.

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[5]It was only when this Court directed its attention to the issue of original jurisdiction that reference was made to the need of a state having an interest independent of and behind the title of its citizens as this relates to the issue of standing to bring an original jurisdiction action. Cases often cited for the proposition that a state cannot sue *parens patriae* without an independent interest do not deal with the traditional concept of *parens patriae* as evolved from the common law. *E.g., Oklahoma v. Cook*, 304 U.S. 387 (1938); *N.Y. v. Louisiana*, 108 U.S. 76 (1883).

V

The Parens Patriae Doctrine in Recovering for Consumer Claims Is Best Used in Conjunction With a Rule 23 Class Action

A *parens patriae* action for consumers is most efficient when used in conjunction with a class action. *State Protection of its Economy and Environment: Parens Patriae Suits for Damages,* 6 Columbia Journal of Law and Social Problems, 411, 430-431 (1970). Under this approach, a class action would be established on behalf of all consumers who had purchased the goods in question during the alleged conspiracy period.

Normal class action procedures would be followed whereby notice would be given to members of the class, the method of notice depending on the facts of each case. Those persons who do not elect to be excluded from the class would be bound by the judgment. Those persons who elect to be excluded would not be bound by the judgment and would be free to pursue their own remedies.

In the trial of the class action, the class representative would be allowed to prove total sales of the consumer good in question within the state.[6] Damages would then be assessed against defendants on the basis of applying the percentage overcharge to the total sales to determine single damages. Trebling the single damages thus ascertained would establish the measure of total damages to be paid by defendants.

The fund thus created would be used for two primary purposes. First, to finance a program to bring forth

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[6]Such a procedure has been approved by the Honorable Miles W. Lord in the currently pending broad spectrum antibiotic cases. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, M 19-93A.

the maximum number of public class members to make claims against the fund. One method of doing so could be by means of mass media advertising. Secondly, to pay damages to class members who appear and file claims as required by the Court. The unclaimed remainder would be disposed of pursuant to order of the Court.[7]

The program described above is desirable as it accomplishes the goals of the antitrust laws. It achieves the intent of private enforcement actions, separates the defendants from their illegal profits and returns the unlawful overcharges to as many consumers as possible.

Conclusion

Based upon the foregoing reasons amicus submits that the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with directions to proceed to trial on Count Two of Hawaii's complaint.

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[7]One possible disposition is to place the unclaimed fund into the state treasury, thereby providing benefit to those who have been injured as well as to the general public. For another type of disposition see *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 63 Cal. Rptr. 724 (1967).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-49

STATE OF HAWAII, *Petitioner*,

v.

STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE STATES OF ALABAMA, ET AL. AS AMICI CURIAE

INTEREST OF THE AMICI

This brief *amici curiae* is submitted by the States of Alabama, *et al.*, pursuant to Rule 42(4) of the Rules of this Court. Amici are thirty-seven states of the United States and the City of New York, New York. For some years past, *amici*, in common with most of the states of the United States and many of the principal cities of the United States, have been increasingly con-

cerned with the direct effect of federal antitrust violations on their respective budgets, economies and citizens. *Amici*, consistent with their obligations to their citizens and in full accord with the federal policy of vigorous enforcement of the antitrust laws, have successfully prosecuted a number of important antitrust cases in recent years.[1] Other important antitrust cases instituted by *amici* are now pending in the lower federal courts. Among these are the so-called "Air Pollution" cases now pending before Judge Real in the United States District Court for the Central District of California pursuant to an order of the Judicial Panel on Multidistrict Litigation, 28 U.S.C. § 1407.[2] In that case, *amici* seek both treble damages and injunctive relief [3] against the major manufacturers of automobiles. The sweeping, and we believe clearly wrong, opinion of the Ninth Circuit in this case may cast doubt on *amici's* efforts to obtain effective redress for the economic consequences of antitrust violations, and, we submit, clearly runs afoul of the Congressional policies which underlie the federal antitrust statutes. *Amici* agree with petitioner, the State of Hawaii, that its complaint stated a claim upon which relief can be granted and that the Court of Appeals erroneously directed dismissal of its complaint. Moreover, *amici* contend that regardless of the result in this particular case, the Court

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[1] E.g., *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2 Cir. 1971).

[2] *In re Multidistrict Vehicle Air Pollution*, M.D.L. No. 31 (C.D. Calif.), *app. pending* (9 Cir.).

[3] Among other relief, *amici* are seeking mandatory injunctive relief to require the Air Pollution defendants to install in their automobiles effective emission devices which, according to the allegations of the complaint, defendants unlawfully conspired and agreed not to develop or install.

below seriously misconceived the remedies available to states and other governmental bodies under the federal antitrust laws.

STATEMENT OF THE CASE

The State of Hawaii has presented a full statement of the case. For the broader overview which *amici* take, the relevant facts can be succinctly stated.

The State of Hawaii filed a complaint in an appropriate district court charging defendants with conspiring to fix and maintain unreasonably high prices for gasoline fuel, petroleum products and asphalt in the State of Hawaii. On its own behalf,[4] Hawaii sought two separate but related kinds of damages and injunctive relief.

In the first count of its complaint, Hawaii sought treble damages for the direct purchases of gasoline and asphalt which it had made. As to that, the parties and

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[4] In Count III of its complaint, Hawaii sought damages as a Rule 23 class representative on behalf of all of its citizens. The District Judge held that such a suit was "unmanageable" and declined to permit the case to proceed as a class action. The interlocutory certification which the District Court issued pursuant to 28 U.S.C. § 1292(b), and the interlocutory appeal which the Court of Appeals permitted, was limited to Count II of Hawaii's complaint. The Court of Appeals expressly declined to rule on the propriety of the trial court's class action ruling. 431 F.2d at 1283 n.3, 1285 n.6. Accordingly, *amici* do not here pursue the class action issues. Instead, we merely note that cases decided since the District Court's class action ruling in this case cast considerable doubt on the "manageability" conclusion. *E.g.*, *In re Antibiotic Drugs*, 1971 Trade Cas. ¶ 73,481 (S.D.N.Y., Feb. 17, 1971); *Eisen* v. *Carlisle & Jacquelin*, 1971 Trade Cas. ¶ 73,563 (S.D.N.Y., April 7, 1971). Rule 23(c)(1) provides that class action orders "may be altered or amended before decision on the merits," and we assume that the District Judge will give careful consideration to a renewed class action motion in light of the intervening authorities.

the courts below are agreed that Hawaii stated a claim upon which relief could be granted, and that, accordingly, a trial must be held at which defendants' liability will be adjudicated. That count is not in issue here.

The second count of Hawaii's complaint sought damages for injuries to the "economy and prosperity of the State of Hawaii." Hawaii's complaint was specific on this score. It alleged, *inter alia*, that as a direct and proximate result of the defendants' antitrust violations "revenues of [Hawaii's] citizens have been wrongfully extracted from [Hawaii's economy]"; that Hawaii's "economy has been held in a state of arrested development" due, in part, to the curtailment of "manufacturing, shipping and commerce" in the State of Hawaii; and that the resulting high costs of manufacturing precluded Hawaii's ability to compete with the products manufactured in other states. The District Judge, in a careful opinion, concluded that this branch of Hawaii's complaint stated a claim upon which relief could be granted.[5] On interlocutory appeal, however, the Court of Appeals disagreed and held that damage to a state's economy by virtue of antitrust violations is not "an injury to the business or property of the state or its people" and that, even if it were, the "at-

[5] In her third amended complaint, Hawaii had attempted to plead a claim as *parens patriae* to recover damages on behalf of her citizens, but the trial court dismissed with leave to amend, holding that a *parens patriae* claim had not been properly pleaded. The pleading now before this Court does not seek such recovery. As pleaded by Hawaii, as sustained by Judge Pence, and as treated by the Ninth Circuit, Count II of the fourth amended complaint seeks damages only for injuries to Hawaii's economy, thus stating a claim in the precise terms defined by this Court in *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945).

tenuated injuries alleged by Hawaii are far outside the area of directness contemplated by the Clayton Act" (431 F.2d at 1285).

ARGUMENT

The Court of Appeals committed two fundamental errors. First, it failed to recognize that damage to a state's economy may indeed constitute damage to the state's business or property. Second, it held that, without regard to the facts of a particular case, damage to the economy is always too remote to be compensible under the federal antitrust laws.

Ever since *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390 (1906), it has been clear that a governmental body, such as a city, county or state, can be injured in either its "business" or its "property" by a federal antitrust violator. Count II of Hawaii's complaint, which the Court of Appeals improperly dismissed, pleads injury to both Hawaii's "business" and its "property."

The whole purpose of modern federal procedure is to decide cases on their merits, not on the basis of paper pleadings. Thus, to "state a claim upon which relief can be granted under [§ 1 of the Sherman Act] allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are *all* that the law requires." *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656, 660 (1961) (emphasis supplied); *Radovich* v. *National Football League,* 352 U.S. 445, 453-454 (1957); *Knuth* v. *Erie-Crawford Dairy Coop. Assn.,* 395 F. 2d 420, 423 (3 Cir. 1968). If at trial Hawaii can prove *the fact* that its economy was damaged by the defendants' antitrust violations, there is no reason why it

cannot recover. And it is settled antitrust law that once the *fact* of damage is shown, uncertainty as to the amount of damage does not preclude recovery. *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251 (1946).

As the district judge so rightly recognized, the challenge to Count II of Hawaii's complaint is not even a debatable one. *Georgia* v. *Pennsylvania R. R. Co.,* 324 U.S. 439 (1945), decided the issue in Hawaii's favor. The Court of Appeals thought *Georgia* inapplicable because it dealt only with injunctive relief under § 16 of the Clayton Act, rather than an action for damages under § 4 of that Act (431 F. 2d 1284-1285). Not so.

In *Georgia,* this Court squarely held that the state was a "'person' entitled to enforce the civil sanctions of the antitrust laws," both as "*parens patriae* as well as proprietor," 324 U.S. 452, the claim for damages failing only because of *Keogh* v. *C. & N. W. Ry. Co.,* 260 U.S. 156 (1922). *Keogh* laid down the rule that rates set by the ICC could not be the subject of treble-damage claims. *Georgia, supra,* 324 U.S. at 453. As this Court said: "[W]e find no indication that, when Congress fashioned those civil [antitrust] remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the antitrust acts." *Georgia, supra,* 324 U.S. at 447. Thus, as Mr. Justice Douglas's opinion makes crystal clear, save for the rule of *Keogh,* Georgia's complaint stated a proper claim for treble damages. The only difference between *Georgia* and this case is that Hawaii's complaint, unencumbered by *Keogh* considerations, states a claim for treble damages which Georgia could not sustain solely because of *Keogh.*

The Ninth Circuit held that the Clayton Act establishes a right to seek injunctive relief but no right to seek damages for the same injury irrespective of whether damages could be established and quantified. This conclusion attributes to Congress an unstated design at odds with recognized principles of law. The basic remedy for injury to a protected interest is normally money damages. And the availability of any remedy presupposes a right to relief and presupposes the fact of damage. The Ninth Circuit decision concedes that Hawaii may seek an injunction, thereby recognizing this right to relief (431 F.2d 1284-1285) but denies Hawaii a chance to prove that the basic remedy of damages is appropriate. If Hawaii has a right to relief, and there is no dispute that it does, then it has a right to any relief which proves to be appropriate. By denying Hawaii the right to prove damages, the Ninth Circuit has implied that Hawaii has no protected interest, which is at variance with the Ninth Circuit's own decision and with this Court's holding in *Georgia* v. *Pennsylvania R. R. Co.*

The Court of Appeals rested its decision on an alternative ground. Assuming that the alleged injury to Hawaii's economy constituted an injury to the state's "business" or "property," the court held as a matter of law that "such injury is indirect and consequential" and hence not compensable under the antitrust laws (431 F.2d at 1285-1286). In the first place, the court erred in approaching the problem as a matter of law and in failing to distinguish between a situation where, as a matter of fact, the injury impacts *indirectly* on the state and a situation—air pollution is a good example—where, as a matter of fact, the injury impacts *directly* upon the state. *Georgia* v. *Tennessee Copper*

Co., 206 U.S. 230 (1907). In air and water pollution cases and in water and natural gas diversion cases as well, this Court has made clear that injury to the state, as quasi-sovereign, is separate and apart from the related injury to the state's inhabitants. *E.g., Tennessee Copper Co., supra,* 206 U.S. at 337; *Pennsylvania* v. *West Virginia,* 262 U.S. 553, 592 (1923). Whether, and to what extent, a state is able to *quantify* its damages in no way affects the directness of the injury "to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Tennessee Copper Co., supra; cf. Assn. of Data Processing Service Org.* v. *Camp,* 397 U.S. 150, 153-154 (1970).

More importantly, the Court of Appeals misconceived the directness requirement of the antitrust laws. Here, as in *Perkins* v. *Standard Oil Co.,* 395 U.S. 642 (1969), the Court of Appeals relied on its decision in *Karseal Corp.* v. *Richfield Oil Corp.,* 221 F.2d 358 (9 Cir. 1955). And here, as in *Perkins,* (395 U.S. at 649-650), that reliance was misplaced. As in *Perkins,* Hawaii "was directly injured and was clearly entitled to bring this suit [and] * * * to present evidence of all of [its] losses to the jury." 395 U.S. at 650.

The ruling below that damages to the economy are incidental or remote results from the Ninth Circuit's skepticism about a state's economy as anything other than an abstraction. This Court did not view Georgia's economy as an abstraction in 1945. Since then there have been significant advances in techniques for measuring economies. "Gross National Product" has become a household phrase, and many states now annually measure their "gross *state* product." Economists have

developed models for measuring the effects upon local economies from infusions or extractions of given sums of money from those economies. In short, a state's economy is susceptible of articulation and measurement.

Hawaii's unique geographic situation affords a clear example of an obviously valid "damage to the economy" suit. Tourism, the Court can judicially note, is one of Hawaii's main industries. Because Hawaii is separated from the mainland by 2500 miles of ocean, the only way tourists can visit Hawaii is by use of public transportation. If all transportation companies serving Hawaii unlawfully conspired to fix the price of transportation at such an unreasonably high price that Hawaii could prove that one of its main industries was destroyed, no one, we submit, could seriously challenge Hawaii's ability to sue for treble damages under the federal antitrust acts. Hawaii's damages from such a hypothetical case might include such very obvious factors as loss of airport and hotel tax revenues to less obvious but equally clear factors as the loss of a substantial number of its businesses which were dependent upon tourism. The overall effect on Hawaii's economy would, of course, be the subject of proof at a trial, and on that issue Hawaii would bear the burden. But surely in such a case, Hawaii would not be deprived of its day in court because the damages which it had alleged were damages to its economy.

So here. If Hawaii can prove as a fact that the illegally high prices which the defendants charged for their gasoline and asphalt products injured its economy by, for example, retarding or restricting "manufacturing, shipping and commerce" as it has alleged it can prove, Hawaii will have been damaged by the

defendants' antitrust violations and entitled to recover under the statute. *Cf. Perkins* v. *Standard Oil Co. of California,* 395 U.S. 642 (1969).

As we view it, this case, like the hypothetical, and indeed all cases where public bodies alleged direct injury to their respective economies by virtue of antitrust violations, is a causation case. At this stage of the proceedings, the measure of Hawaii's damages is not at issue. Perhaps the proof will show that Hawaii is entitled to damages because it has been deprived of tax revenues. Perhaps the evidence will support some other theory of damages. But it is the *fact* that Hawaii has been damaged that creates its legal right to recover. And that fact cannot be established save at trial. The district judge correctly ruled that Hawaii was entitled to its day in court. The Court of Appeals, reviewing paper pleadings, not a trial record, held that Hawaii's damage "is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection" (431 F.2d at 1285), pointing to Hawaii's alleged inability to "articulate a more precise theory or measure of such damages" (431 F.2d at 1285). Even after full pretrial discovery, litigants are not necessarily required to "articulate a more precise theory," as Judge Charles Clark made clear in *Padovani* v. *Bruchhausen,* 293 F.2d 546 (2 Cir. 1961). *A fortiori,* such "theory pleading" cannot justify dismissal of Hawaii's complaint before pretrial discovery has taken place.

We submit that before this Court fixes the metes and bounds of "injury to the economy" antitrust suits, it ought to have the benefit of a full trial record and the findings, either of a jury or a trial judge. At this stage of the case, we submit that Count II of Hawaii's com-

plaint states a claim which, if proved at trial, entitles Hawaii to relief.

CONCLUSION

By reason of the foregoing, the judgment of the Court of Appeals should be reversed and the case should be remanded to the district court with directions to proceed to trial on Count II of Hawaii's complaint.

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OCTOBER TERM, 1971

No. 70-49

STATE OF HAWAII,
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vs.

STANDARD OIL COMPANY OF CALIFORNIA,
UNION OIL COMPANY OF CALIFORNIA,
SHELL OIL COMPANY
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Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-49

STATE OF HAWAII,
Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
UNION OIL COMPANY OF CALIFORNIA,
SHELL OIL COMPANY
and CHEVRON ASPHALT COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief for Respondents

QUESTION PRESENTED

This is a suit by the State of Hawaii to recover treble damages from respondents under section 4 of the Clayton Act for alleged violation of the Sherman Act. In Count One, Hawaii seeks treble damages for injury allegedly suffered in its proprietary capacity as a purchaser of refined petroleum products. Count Two purports to allege an additional cause of action by Hawaii as *parens patriae*—one for treble damages for alleged injury to the

general "economy and prosperity" of the state. On interlocutory appeal, the court below directed dismissal of Count Two.

The question presented is whether, in addition to the right of a state to recover treble damages under section 4 of the Clayton Act for injury to its business or property, and in addition to the right of its citizens, individually or in appropriate class actions, to recover treble damages for injury to their business or property, a state, in its capacity as *parens patriae,* may also sue to recover treble damages under section 4 for alleged injury to its general "economy and prosperity."

STATEMENT OF THE CASE

This is an action by the State of Hawaii against respondents for treble damages under section 4 and for an injunction under section 16 of the Clayton Act (15 U.S.C. §§ 15, 26). The State of Hawaii sued respondents in the District Court of Hawaii in one count charging a conspiracy to fix prices of refined petroleum products in Hawaii to the damage of the state as a buyer of those products (App. 19). A second count, under the Robinson-Patman Act (App. 24), was later abandoned. Successive amendments added additional counts. A fourth amended complaint, in Count One, repeated the conventional Sherman Act claim of the original complaint (App. 59), but added Count Two, which realleged the first 16 paragraphs of Count One—including all the allegations about the nature and scope of the conspiracy—and then alleged (App. 64-65):

> "19. The State of Hawaii * * * brings this action by virtue of its duty to protect the general welfare of the

State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.

"20. The unlawful contracts * * * have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:

"(a) revenues of its citizens have been wrongfully extracted from [the economy of] the State of Hawaii;

"(b) taxes affecting the citizens and commercial entities have been increased to [offset] such losses of revenues and income;

"(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

"(d) the full and complete utilization of the natural wealth of the State has been prevented;

"(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

"(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

"(g) the Hawaii economy has been held in a state of arrested development" (App. 65).

Count Three purported to allege a class action for a class consisting of every purchaser of refined petroleum products in the state (App. 65, 66). The district court dismissed this count as involving an unmanageable class, but without prejudice to pleading a proper class or classes (App. 96). An offer by the district court to certify this order of dismissal for interlocutory appeal under 28 U.S.C. § 1292(b) was rejected by petitioner (App. 81).

Respondents moved to dismiss Count Two on the ground that the complaint does not state a claim for relief *parens*

patriae and that, in any event, no *parens patriae* action will lie for recovery of damages under the Clayton Act (App. 45, 68). It was pointed out that Count Two was unnecessary to enable Hawaii to obtain injunctive relief because Hawaii could obtain full injunctive relief under Count One if the allegations of that count were proved, and Count Two contained no substantive allegations not borrowed from Count One.

The district court declined to dismiss the *parens patriae* count. In ruling on this count, the court carefully reviewed and gave effect to the many decisions of this Court holding that a state, suing as a sovereign in its capacity as *parens patriae*, does not have standing to recover damages suffered by its citizens as individuals (App. 88-89):

> "An analysis of the above cases indicates that if a state is to maintain an action in its *parens patriae* capacity, *initially* the facts must show that the state has an interest 'independent of and behind the titles of its citizens,' *Georgia v. Tennessee Copper Co., supra* [206 U.S. 230]; 'has an interest apart from that of the individuals affected,' *Pennsylvania v. West Virginia, supra* [262 U.S. 553]; 'must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest,' *Oklahoma v. Cook, supra* [304 U.S. 387]; '[it] must appear that the controversy to be determined is * * * not a controversy in the vindication of grievances of particular individuals,' *Louisiana v. Texas, supra* [176 U.S. 1]. Thus the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The two *theories for recovery* of damages are separate and distinct. (At this stage, we do not concern ourselves with the nature of proof.) So, here, the State in the guise of *parens patriae* cannot recover for the indi-

vidual and several possible damage claims of its many citizen-consumers of petroleum products. As the preceding cases unmistakably set forth, and as the dissent in *Georgia v. Pennsylvania R. Co., supra,* points out:

> " 'The inhabitants of the State who have suffered injury or who are threatened with injury by the unlawful practices alleged * * * are alone entitled to seek a legal remedy for their injury, and are the proper parties plaintiff in any suit to enforce their rights which are alleged to have been infringed. It has long been settled by the decisions of this Court that a State is without standing to maintain suit for injuries sustained by its citizens and inhabitants for which they may sue in their own behalf' " (324 U.S. 473).

Nevertheless the district court held that the state could sue in its capacity as *parens patriae* to recover treble damages under section 4 of the Clayton Act for any "deleterious impact upon the general welfare or economy of the state" (App. 90):

> "While a state may not sue, *parens patriae,* for the recovery of possible individual damages or claims of its inhabitants, nevertheless if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity."

On interlocutory appeal, certified under 28 U.S.C. § 1292(b), the court of appeals reversed the decision of the district court (App. 100). The court of appeals observed at the outset that no question concerning the class action was before it (App. 102, n. 3). It emphasized that Hawaii's claim under Count Two was for alleged injury to the general economy and prosperity of the state as a politically and socially organized community, an injury which Hawaii

asserted had an existence independent of any injury to the state in its proprietary capacity, or to its citizens individually or in the aggregate (App. 104-105):

> "Hawaii's claim does not constitute an effort to prevent unjust enrichment by the wrongdoers through recovery by the state, for the affected consumers or for itself, of the total of direct injuries suffered by persons who are unable to seek recovery for themselves. Hawaii's claim is over and above all such recovery by persons, or on behalf of classes, and is asserted to have independent existence quite apart from such direct injuries."

The court pointed out that "the general economy is an abstraction," and expressed doubt that "an independent harm to the general economy" could exist (App. 105). However, "assuming *arguendo* that the general economy can suffer injury from antitrust violations independent of the injuries suffered by private persons or by the state in its proprietary role," it held upon two closely related grounds that Hawaii's claim for treble damages was clearly outside the scope of section 4 of the Clayton Act: (1) an injury to the general economy of the state, separate and apart from an injury to the state in its proprietary capacity, is not an injury to the "business or property" of the state; and (2) any such injury would be so incidental, remote and consequential as to fall far outside the area of direct injury contemplated by the Clayton Act (App. 105-106).

The court concluded (App. 106):

> "Compensation of the public (let alone treble damages) for injury of such an extraordinary character presents policy questions which, in our view, should be subjected to close Congressional inquiry and study. We do not believe that § 4 as it now stands can be construed to make such recovery available."

SUMMARY OF ARGUMENT

I. A. This Court's decisions, reiterated and summarized in *Georgia v. Pennsylvania R. Co.* (1945) 324 U.S. 439, establish that the *parens patriae* concept does not embody suit by a state upon injuries sustained by its citizens or measured by their loss. Moreover, the right to damages for an antitrust violation is solely a creature of statute (Clayton Act, § 4). Since that Act creates no cause of action for unjust enrichment, and since also the doctrine of unjust enrichment never permits recovery by anyone but the party at whose expense the wrongdoer has been enriched, a state cannot under unjust enrichment doctrine recover for antitrust damages sustained by its citizens. Nor may it recover damages measured by its citizens' loss, for the Clayton Act confers on a suitor the right to recover only for his own damages. To permit a state to recover for other than damage suffered in its proprietary capacity would be to impose a fine at the suit of a state, a sanction not provided by any federal law.

B. No action lies for damage under the Clayton Act for supposed injury to a state's "general economy and prosperity," which is an intangible abstraction different both from the damages to it in its proprietary capacity and the sum total of damages to its inhabitants. This follows from (1) the very nature of the interest which *parens patriae* doctrine permits a state to vindicate by suit and (2) the nature of the injury for which alone the Clayton Act has authorized a suit for damages. The two are diametrically inconsistent.

1. All *parens patriae* proceedings have been in equity. Those proceedings originated as a branch of the prerogative power of the crown which it exercised by the chancellor; in the United States *parens patriae* doctrine further developed

in decisions dealing with the original jurisdiction of the Supreme Court. Both in its origin and its development the rationale of the *parens patriae* suit has been the protection of interests of the state as sovereign or quasi-sovereign, interests not measurable by a money calculus. To convert a *parens patriae* preceeding into one for damages would depart from the tradition and underlying reason of the proceeding. The district court granted this to be true, but it incorrectly read *Georgia v. Pennsylvania R. Co., supra,* as containing dictum permitting a suit for damages. The passage which is incorrectly read simply held that nothing in the antitrust laws prevents a state from maintaining, under those laws, *parens patriae* suits of a kind "long recognized," that is, suits in equity, and the Court was addressing itself to Georgia's right to seek an injunction.

2. Petitioner's request to the Court to create new *parens patriae* law by expanding standing to sue to damage suits ignores the fact there must still be a cause of action. The antitrust cause of action for damages is statutory, and the statute (Clayton Act, § 4) confines it to injuries to "business or property." A state's interest in its "general economy or prosperity" is not "business or property." It is a non-proprietary interest "beyond its property rights" (*Kansas v. Colorado* (1907) 206 U.S. 46), "independent of and behind the titles of its citizens" (*Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230), of the nature of things before the concept of property even evolved (*Geer v. Connecticut* (1896) 161 U.S. 519), pertaining to sovereignty or quasi-sovereignty. This is poles apart from the mundane commercial interest or commercial impact which all the cases construing the expression "business or property" in Clayton Act, § 4, concur that it delineates. The inapplicability of § 4 is

underscored by contrast with Clayton Act, § 16, which permits injunctive relief against any threatened loss or damage and is not limited to "business or property." As taught in *In Re Debs* (1895) 158 U.S. 584, the sovereign in the exercise of its governmental powers is entitled to equitable relief though it has no pecuniary interests to protect.

3. Congress understandably granted a narrower right to damages than to equitable relief because it knew that it could entrust a broader range of inquiry to judges in equity while requiring adherence to some standard of measurability in actions triable by a jury. An issue as amorphous as "adverse effect on the general economy" of a state is not jury triable, if justiciable at all. The question is not one of proof but of right to sue at all, for the leeway of the Clayton Act in ascertaining damages is given only after a plaintiff establishes himself on the solid platform of injury to his "business or property."

4. Hawaii's proprietary claim to damages as a purchaser and the claims of its citizens to recover in suits brought by them individually or in appropriate class actions for injury to their business or property comprise all possible claims for damages resulting from injury to anyone's "business or property." In seeking more, Hawaii should address its arguments to Congress. No argument upon the language or holding of the opinion in *Georgia v. Pennsylvania R. Co., supra,* remotely supports petitioner's claim under the *parens patriae* count of its complaint.

II. One whose injury is an incidental or remote consequence of a violation of the antitrust laws has no standing to recover damages under the Clayton Act. A rational causative link must exist between the offense and the alleged injury. Regardless of how liberally this standing rule is construed, an "adverse effect" upon the general

"economy and prosperity" of a state is so indirect, remote and consequential as to fall far outside the area of directness required by the Clayton Act.

III. Over and beyond what is stated in Points I and II above, the decisions of this Court make clear that Hawaii's complaint does not set out a cause of action which a state has standing to assert *parens patriae,* either for damages or for an injunction. A conspiracy (in this case to fix prices), the direct and immediate impact of which falls upon individual purchasers who have an adequate conventional remedy presents a controversy in which individual citizens are the real parties in interest and is totally outside the well-defined area of *parens patriae.* This is the teaching of *Oklahoma v. A., T. & Santa Fe Ry.* (1911) 220 U.S. 277, which was expressly reaffirmed in *Georgia v. Pennsylvania R. Co.* (1945) 324 U.S. 439.

IV. There is no basis in the record for petitioner's argument that the district court, in dismissing the class action count, foreclosed any effective remedy to the many purchasers of gasoline in Hawaii. The district court held, only, that a class composed of every purchaser of petroleum products in Hawaii is unmanageable and therefore not in compliance with Rule 23 of the Federal Rules of Civil Procedure. Its order was without prejudice to the pleading of a proper class action, and petitioner declined the court's offer to certify its class action ruling for simultaneous interlocutory appeal with its *parens patriae* ruling.

ARGUMENT

I. NO PARENS PATRIAE ACTION LIES FOR DAMAGES UNDER THE CLAYTON ACT.

Preliminary to the question whether a *parens patriae* action lies for damages under the Clayton Act is the ques-

tion of what kind of recovery is embodied in the novel concept of a *parens patriae* suit for damages. An answer to that subsidiary question will sharpen the principal issue.

A. Parens Patriae Concepts Do Not Permit Recovery by a State of Damages Sustained by Its Citizens or Measured by Their Loss.

The district court, while sustaining Hawaii's right to maintain a *parens patriae* action for damages, made it clear that it did not agree that under that or any other guise a state may recover the damages sustained by its citizens. In its opinion that court made a statement which we quote at some length at pp. 4-5 *supra*, for its documentation of this Court's decisions to that effect. But in this Court Hawaii returns to a claim, rejected by the district court and abandoned by Hawaii in the court of appeals and therefore not considered by that court, that, *parens patriae*, a state may sue for damages sustained by its citizens and put the recovery in the state treasury.[1] And that appears to be the gist of the brief of California as *amicus curiae*. Two different arguments are tendered to escape settled law.

The first is that this Court should boldly create new law. The second is that recovery might be predicated on the doctrine of unjust enrichment. The two arguments run in essence as follows: The alleged conspiracy has taken money out of the pockets of the citizens of Hawaii, it is abhorrent that a wrongdoer should keep ill-gotten gains, and the gain, trebled, should therefore be given, not to those injured, but to the state. This novel theory is not one of recompense to a plaintiff for injury in its "business or property" or even of recompense for injury to it in any capacity. It is a theory

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1. Hawaii does not say whether both it and its citizens may each recover treble the amount of all claims, or whether Hawaii may and has expropriated the claims of all its citizens.

of allowing a state to recover from defendants as a punishment for violation of a Federal law, measuring the recovery by relating it to injury to its citizens in some undefined way. Thereby, under the guise of recovery of damages, a state would be able to fine a supposed violator of Federal law in amounts not confined to the limits of the penalties to which the United States is confined by section 1 of the Sherman Act. Obviously, the doctrine of unjust enrichment is not available, for that doctrine never permits recovery by anyone but the party at whose expense the wrongdoer has been enriched (RESTATEMENT, RESTITUTION § 1). And, equally obviously, the Clayton Act creates no cause of action for unjust enrichment.

Yet, it cannot be forgotten, a private, Federal right of action for conspiracies in restraint of trade does not issue out of the common law but is purely the creation of Congress. There is no right of action under the antitrust laws except as "a federal statute has created that right" (*Nashville Milk Company v. Carnation Company* (7 Cir. 1956) 238 F.2d 86, 88, affirmed (1958) 355 U.S. 373). The rights and remedies of one seeking damages under the antitrust laws arise exclusively from section 4 of the Clayton Act (*Vance v. Safeway Stores* (D.N.M. 1956) 137 F.Supp. 841, 845, 846, affirmed as to this point (1958) 355 U.S. 389).

It follows that a state cannot recover on a theory of unjust enrichment. It also follows that it cannot recover on the basis of damages sustained by someone else, albeit they are its citizens, for the Clayton Act confers on a suitor the right to recover for his own damages alone.

And such is the precise holding in *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D. Pa. 1969) 309 F.Supp. 1057, appeal dismissed (3 Cir. Feb. 2, 1970), where the court denied leave to Kansas and California to

amend their complaints to allege a right to recover damages under the Clayton Act as *parens patriae*.

In *Georgia v. Evans* (1942) 316 U.S. 159, this Court held that a state is a "person" within the meaning of section 4 of the Clayton Act, and could bring a treble damage action under that section for injury suffered in its proprietary capacity. In so ruling, this Court construed section 4 to give to a state the same remedy—nothing more—available to other purchasers injured by an antitrust violation (316 U.S. 162):

> "The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act."

The right of a state to sue for treble damages under the antitrust laws—the same right which is available to all other persons and which was sustained by this Court in *Georgia v. Evans*—is the right which Hawaii asserts in Count One of the complaint. This right is not in issue here.

B. No Parens Patriae Action, Under the Clayton Act, Lies for Any Damages at All.

Hawaii falls back on a claim that what it seeks to recover, *parens patriae*, is damages to an inchoate abstraction called injury to its "general economy and prosperity"—an intangible something (1) different from damages to it in its proprietary capacity, and (2) different from the sum total of damages to any and all of its citizens and inhabitants.

The question whether any such cause of action exists has nothing to do with questions of quantum of proof. It goes

directly to the very nature of the cause of action existing in (1) a *parens patriae* suit (2) under the Clayton Act. It is essential to observe the two different elements involved: (1) the nature of a *parens patriae* suit, and (2) the nature of the cause of action for treble damages created by Congress. Expressed somewhat differently, one must examine both standing to sue and cause of action or claim for relief. Both must exist. The question of standing is whether the state, as sovereign, may be heard at all as a litigant, if an actionable wrong has occurred. But in order for a litigant to be heard, there must be a cause of action.

Analysis of these two concepts will reveal that the nature of the interest which the doctrine of *parens patriae* permits a state to vindicate by suit is diametrically inconsistent with the nature of the injury for which Congress has authorized a suit for damages under the Clayton Act. The two cannot coexist.

1. BECAUSE OF THE VERY NATURE OF THE INTEREST FOR WHOSE VINDICATION A PARENS PATRIAE SUIT LIES, SUCH A SUIT IS SOLELY IN EQUITY.

All *parens patriae* suits in Anglo-American history have been in equity. In no case to our knowledge has a state been permitted to recover damages in such an action on any kind of claim, statutory or non-statutory. In the more than 80 years since the enactment of the Sherman Act no state has ever asserted any such claim. This Court in *North Dakota v. Minnesota* (1923) 263 U.S. 365, 373-74, reviewed some of the typical *parens patriae* cases:

> "[A] suit by one State to enjoin [pollution] * * *. *Missouri v. Illinois,* 180 U.S. 208, 241; s.c. 200 U.S. 496, 518. * * * [A] bill to restrain * * * a diversion of water * * *. *Kansas v. Colorado,* 185 U.S. 125, 141, 143; s.c. 206 U.S. 46, 95. In *Wyoming v. Colorado,* 259 U.S. 419, 464, it granted relief to one State to prevent * * *

diverting water * * *. In *Georgia v. Tennessee Copper Co., supra,* it enjoined * * * the generation and spread of noxious fumes * * *. In *Pennsylvania v. West Virginia,* 262 U.S. 553, 592, * * * this Court has enjoined [enforcement of a statute] * * *."

Proceedings *parens patriae* originated as a "branch of the prerogative power of the king * * * which he exercises by the chancellor," Taney, C.J. in *Fontain v. Ravenel* (1854) 58 U.S. (17 How.) 369, 391. Equity jurisdiction stems from the same royal prerogative, first exercised by the sovereign to remedy defects in the common law, and later delegated by the sovereign to his direct agent, the Chancellor. 1 LAWRENCE, EQUITY JURISPRUDENCE, §§ 20, 23-29 (1929). The *parens patriae* proceeding antedates the equity jurisdiction as a more immediate application of the royal prerogative. *Fontain v. Ravenel, supra;* STORY (Mr. Justice), EQUITY PLEADINGS, §§ 8, 49 (10th Ed. Gould 1892).[2] The law defining the quasi-sovereign interests which are justiciable in actions by the States of our Union in their capacities as *parens patriae* has further developed, with few exceptions, in the decisions of this Court dealing with its original jurisdiction.[3]

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2. Story, § 49:
"In the first place, then, let us consider who may sue in equity. The king or government may (as has been already stated) sue in a court of equity, not only in suits strictly on behalf of the crown or government, for its own peculiar rights and interests; but also on behalf of the rights and interests of those who partake of its prerogative, or claim its peculiar protection."

3. The principles underlying these cases are to be distinguished from the exercise by the states of what formerly was that part of the Royal Prerogative of the King to sue *parens patriae* as guardian of "infants, lunatics and idiots" and as superintendent of "all charities." (See for a discussion of this exercise of the *parens patriae* powers of the states, Malina and Blechman, "Parens Patriae Suits for Treble Damages Under the Antitrust Laws" (1970) 65 Nw. U. L.Rev. 193, 197, et seq.)

The very rationale of a *parens patriae* suit relates to the protection of the interests of the state as a sovereign or quasi-sovereign in the common welfare of its citizens as a whole, and those interests are not measurable by a money calculus. The sovereign may levy fines, but otherwise it protects its own interests by "specific or preventive relief."[4] Injury to the state in its capacity as *parens patriae* is, by its very nature, not susceptible of monetary measurement, e.g., jeopardy to the health, comfort and welfare of a state's citizens by withholding the state's fuel supply[5] or by discharging the sewage of a huge metropolitan area into streams and rivers flowing through adjacent states.[6] It is precisely for situations like these that equity devised its remedies:

> "It is a general rule that, where a complainant shows that the injury threatened will be an irreparable one, a court of equity will grant relief by an injunction.
>
> * * * * *
>
> "* * * [A]n injury is * * * irreparable * * * when the damages which may result therefrom cannot be measured by any certain pecuniary standard" (1 Joyce on Injunctions (1900) pp. 70-72).

In short, to convert a *parens patriae* proceeding into one for damages would not only be historically novel, it would

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4. The fundamental difference between the kind of relief awarded at law and that in equity is recognized in statutory enactments in various states borrowed from the Field draft code of 1865. As there shown "specific and preventive relief" is the province of equity; "specific and preventive relief" is the instrument by which the sovereign has protected its interests.

5. *Pennsylvania v. West Virginia* (1923) 262 U.S. 553, 592.

6. *Missouri v. Illinois & Chicago District* (1901) 180 U.S. 208, 241.

be a departure from the whole tradition and underlying reasoning of the proceeding; it would be the creation of new rights and new remedies palmed off under an old and traditional label.

The district court recognized this history. Said it (App. 76):

> "Were it not for the words of Justice Douglas in that divided-Court decision in Georgia versus Pennsylvania Railroad, the problem would be simple, because, going down through the cases that have touched upon *parens patriae* and its use in the field of law, it only involved equitable relief."

But, we submit, the district court failed to read correctly what this Court had said in *Georgia v. Pennsylvania R. Co.* What it there said was (324 U.S. 447):

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy [which] * * * injured the economy of Georgia. * * * when it came to other sanctions Congress * * * authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae, have long been recognized.* There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts" (emphasis added).

This is clear language. What this Court there plainly said was: There is no reason why "those suits," that is, suits by a state *parens patriae* which have long been recognized, should be excluded from the purview of the anti-trust acts. But the suits which "have long been recognized" as maintainable *parens patriae* were solely suits in

equity. That is all that this Court dealt with in *Georgia v. Pennsylvania R. Co.* It is all that it was there speaking about. To assign to this Court's words an embracement of suits for damages would be to attribute dictum to it on a subject not before the Court and, more than that, dictum which its words simply do not carry.

In *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D. Pa. 1969) 309 F.Supp. 1057, appeal dismissed (3 Cir. Feb. 2, 1970), the court denied leave to Kansas and California to amend their complaints to allege a right to recover damages under the Clayton Act as "*parens patriae*." Referring to all *parens patriae* citations other than the district court's decision in the instant case, it said (p. 1058):

> "In essence, they are cases which dealt, as defendants point out, only with the propriety of suits 'parens patriae' for *injunctive or other equitable relief*" (italics in the original).

And of *Georgia v. Pennsylvania R. Co.* it said (p. 1060):

> "In the *Georgia* case, *supra*, the * * * Court ruled, however, that Georgia *would not be permitted to recover damages*" (italics in the original).

If there were any doubt as to the correct meaning of *Georgia v. Pennsylvania R. Co.*, it is quickly dispelled by a review of history and the state of jurisprudential analysis at the time the Sherman and Clayton Acts were enacted. In *Kansas v. Colorado* (1906) 206 U.S. 46, 99, the Court remarked:

> "*Beyond its property rights* it [Kansas] has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State" (emphasis added).

It was this interest—"*beyond its property rights*"—that gave rise to a right to proceed *parens patriae*. In much the

same language and expressing precisely the same idea, handing down its decision in *Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230, 237 (per Holmes, J.), on the very same day as *Kansas v. Colorado,* this Court said:

> "The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

In its very first decision confirming in the States of the Union the right to sue in a *parens patriae* capacity — *Louisiana v. Texas* (1900) 176 U.S. 1—this Court based its ruling in part upon its earlier pronouncement in *In Re Debs* (1895) 158 U.S. 564, which discussed the broad principles applicable to injunctive relief when sought by the sovereign in the exercise of its powers to preserve the general welfare. The Court in the *Louisiana* case pointed out (176 U.S. 19):

> "It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae,* trustee, guardian or representative of all her citizens."

And it relied upon and quoted from what the Court had earlier said in *Debs* (158 U.S. 584, 586):

> "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the

matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court.

* * * * *

"It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

2. THE CLAYTON ACT PROVIDES FOR DAMAGES ONLY TO "BUSINESS OR PROPERTY." ADVERSE EFFECT ON A STATE'S GENERAL ECONOMY IS NOT "INJURY TO BUSINESS OR PROPERTY."

In short, to ask the Court to hold that a *parens patriae* suit can be maintained for damages is to ask it to create new law. The briefs of Hawaii and of *amici curiae* call on the Court to do just that. But the cause of action sought to be pleaded in this case does not arise from decisional law. It rests on an Act of Congress. Whatever may be a court's powers to break new ground in non-statutory areas it cannot create rights whose existence rests solely in the hands of Congress.

Thus, even if *parens patriae* prineiples permitted a state to sue for damages, it would still be necessary that there be a cause of action on which it could sue. If there were a non-

statutory cause of action, as in tort or for breach of contract, that would be one thing. But here the cause of action must be found in a Federal statute or it cannot exist, and a court cannot create what Congress has not created.

We therefore turn to the words of the Clayton Act as the absolute touchstone. Section 4 of the Clayton Act (formerly section 7 of the Sherman Act) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee" (15 U.S.C. § 15).

Thus the Clayton Act provides a cause of action for damages for any person who shall be injured in his "business or property." Injury or adverse effect upon a state's "economy and prosperity" are not injury to "business or property."

The district court's answer to the fact that the Clayton Act permits recovery only for injury to "business or property" was this (App. 93):

> "If the economy of a state can be injured, then that economy is finite and can fall within a definition of the word 'property', even though it does not fall within the normal, simple definition of 'business and property' under Section 4 of the Clayton Act."

We respectfully submit not only that the reasoning is unsound on its face, but that the contrary necessarily is plain from *Georgia v. Pennsylvania R. Co.* itself. There the Court followed the rule that a *parens patriae* suit lies only when a state sues in a sovereign or quasi-sovereign capacity for injuries to the state as a socially organized entity, as

distinguished from injuries to interests "which are proprietary." It said (324 U.S. 447-448):

> "* * * the interests of the State are not confined to those which are proprietary; they embrace the so-called 'quasi-sovereign' interests which in the words of *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'"

The Court sharply contrasted the right of a state to proceed *parens patriae* with its right to sue as any other person for injuries to its "proprietary interests." Thus *Georgia* clearly recognized that an action *parens patriae* cannot be maintained for injuries "which are proprietary." But the language of section 4 relates only to interests "which are proprietary."

The court below was plainly correct when it pointed out (App. 105-106):

> "An injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary capacity, engage in business. For injury suffered in these respects a state can recover under § 4. *Georgia v. Evans*, 316 U.S. 159 (1942). Such was the basis for Hawaii's Count I. But the terms 'business or property' are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community * * *. Unless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly."

This conclusion is obvious whether examined from the standpoint of the kind of interest with which the *parens patriae* doctrine is concerned or from the standpoint of the

antitrust decisions applying the concept of "business or property." Examined from both standpoints the conclusion is inescapable.

As we have seen at pages 18-20 above, the kind of interest *parens patriae* is designed to vindicate is a non-proprietary interest. The concept of "general economy or prosperity" involved in *parens patriae* doctrine is even more intangible than the juristic notion of *res communes*. To see in perspective what juristic concepts the Court had in mind when, in *Kansas v. Colorado* (1907) 206 U.S. 46, 99, it used the phrase "beyond its property rights" and when, in *Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230, 237, it referred to the interest a state has "independent of and behind the titles of its citizens," one may well refer to *Geer v. Connecticut* (1896) 161 U.S. 519, 525, decided only shortly after enactment of the Sherman Act.[7] The interest which a state has "beyond its property rights" or "independent of and behind the titles of its citizens" conceptually antedates the kind of "negative community" which itself antedates in juristic theory the division of nature's resources into objects of property rights. It is this kind of interest with which *parens patriae* is concerned. And it is poles apart from the mundane commercial "business or property" of section 4 of the Clayton Act.

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7. There the Court reviewed concepts basic in English legal texts reached via the jurists of the middle ages from the Roman jurisconsults:

> "* * * Pothier moreover says: 'The first of mankind had in common all those things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each has his particular portion. It was a community, which those who have written on this subject have called a negative community, which resulted from the fact that those things which were common to all, belonged no more to one than to the others, and hence no one could prevent another from taking of these common

Every decision to our knowledge dealing with the antitrust concept of "business or property" gives that concept a signification of commercial impact. In addition to the citations of the court below,[8] there are many others.[9] *Broadcasters Inc. v. Morristown Broadcasting Corp.* (D. N.J. 1960) 185 F. Supp. 641, 644, states that in the Clayton Act "the term 'business or property' is used in the ordinary sense and denotes a commercial venture or enterprise." In its ordinary sense "business" denotes " 'the employment or occupation in which a person is engaged to procure a living' " *Roseland v. Phister Mfg. Co.*, 125 F.2d 419. And, when used in the same sense, the word "property" simply cannot be stretched to include an interest not susceptible of ownership or possession and as inchoate as the general econ-

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things that portion which he judged necessary in order to subserve his wants. Whilst he was using them others could not disturb him, but when he had ceased to use them, if they were not things which were consumed by the fact of use, the things immediately re-entered into the negative community, and another could use them. The human race having multiplied, men partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain therefore to this day in the condition of the ancient and negative community.' No. 21

"Referring to those things which remain common in what he qualified as the negative community, this great writer says:

'These things are those which the jurisconsults called res communes. Mercien refers to several kinds—the air, the water which runs in the rivers, the sea and its shores.' "

8. *Martin v. Phillips Petroleum Company* (5 Cir. 1966) 365 F.2d 629, cert. denied (1966) 385 U.S. 991; *Duff v. Kansas City Star Company* (8 Cir. 1962) 299 F.2d 320; *Roseland v. Phister Mfg. Co.* (7 Cir. 1942) 125 F.2d 417.

9. E.g., *Image and Sound Service Corp. v. Altec Service Corp.* (D. Mass. 1956) 148 F.Supp. 237, 239; *Peller v. International Boxing Club* (7 Cir. 1955) 277 F.2d 593, 595-596; *Triangle Conduit & Cable Co. v. National El. Prod. Corp.* (3 Cir. 1945) 152 F.2d 398, 399-400.

omy or prosperity of a sovereign state. These concepts rest solidly upon the fundamental nature of the antitrust laws which are "tailored * * * for the business world," with outer bounds being "commercial impact" (*Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 141).

Waldron v. British Petroleum Co. (S.D. N.Y. 1964) 231 F.Supp. 72, is cited by petitioner for a broad definition of the meaning of the word "property." But the holding in *Waldron* was merely that a business contract having a commercial value is property within the purview of the Clayton Act. In *Hamman v. United States* (D. Mont. 1967) 267 F.Supp. 420, 432, appeal dismissed (9 Cir, 1968) 399 F.2d 673, the court construed *Waldron's* broad definition as relating only to commercial interests and therefore as not reaching a right of consortium, albeit consortium is an interest protected by law.

Petitioner contends that the decision of this Court in *Georgia* must be read as affirming sub silentio a state's right to recover treble damages in its capacity as *parens patriae*. The argument runs (Br. 38-39[10]) that sections 4 and 16 of the Clayton Act have an identity of purpose and that this Court could not have recognized Georgia's right to sue for an injunction without necessarily holding that it had suffered an injury to its "business or property." The court below rejected this contention, and properly so, pointing out (App. 104):

> "Section 16, 15 U.S.C. § 26, is far broader than § 4. Any person may secure injunctive relief against threatened loss or damage by violation of the antitrust laws. Section 4 provides for recovery of treble damages only by a person injured in his business or property by such a violation."

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10. The Brief for the Petitioner is referred to herein as "Br."

Section 4 is specific in its limitation of damages to those which are caused by injury to the plaintiff's "business or property." In contrast, section 16 provides a remedy by injunction:

> "• • • against threatened loss or damage by a violation of the antitrust laws • • • when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity • • •."

Thus, the language of section 16 is comprehensive and provides for injunctive relief against any threatened loss or damage caused by a violation of the antitrust laws, such relief to be measured by the "principles" governing the general exercise of the powers of courts of equity. But section 4 is confined to a very particular kind of loss or damage, that to "business or property" and to nothing else.

The language is clear; the distinction is clear. Normally, the kind of damage encountered is to "business or property." But if in a given case there is threatened loss or damage beyond the categories of damage to "business or property," the language of section 16 may reach it while that of section 4 does not. And the obvious situation where this is so is precisely when a state sues *parens patriae*. There, as clearly taught in *In Re Debs* (1895) 158 U.S. 564, discussed at pages 19-20 above, injunctive relief may be granted under the "principles" of equity although the sovereign has no pecuniary interest of any kind.

The gist of the matter is simply this: section 4 of the Clayton Act authorizes recovery only for injuries to one in his "business or property." The basis upon which any *parens patriae* suit proceeds and the basis upon which a damage suit under the Clayton Act is authorized are mutually exclusive. The *parens patriae* suit lies only for protection

of the sovereign against injury to it in its sovereign or quasi-sovereign capacity. The general "economy and prosperity" of the state, protectable in such suits, is not "business or property."

3. THE ISSUE PETITIONER SEEKS TO TRY IS BEYOND THE CAPACITIES OF JUDICIAL ADMINISTRATION.

It is not difficult to understand why Congress by the Clayton Act granted a broader right to seek equitable relief than to recover damages. A suit for damages is triable by a jury, a suit in equity by the court. Even in proprietary situations, determination of whether there has been damage and then its assessment leave a broad range of uncertainty. Transplant them to a determination of injury to an abstract notion of "general economy and prosperity" and one passes into another dimension. A judgment in an action at law looks to the past. If error or excess should occur in the fact-finding in an action at law, the result can be unimaginably punitive and unjust. By contrast a decree in equity looks to the future. It does no more than set guidelines for the future to which all can adapt themselves. Congress could well have concluded that it could entrust the broader range of inquiry to judges in equity while requiring adherence to a standard of measurability in actions triable by jury. As this Court, through Mr. Justice Brandeis, said in *Keogh v. C.&N.W. Ry. Co.* (1922) 260 U.S. 156, 165:

> "• • • recovery [of damages under the Clayton Act] cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable."

An issue as amorphous as injury or "adverse effect" to the general "economy or prosperity" of a state simply does not

present a justiciable issue, let alone an issue which under any rational system of law could be submitted to a jury.[11] This was recognized by the State of Georgia itself in the *Georgia* case. Its bill of complaint, addressed to this Court

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11. An illustration of how impossible it would be for a jury to attempt to ascertain damages is furnished by a recent comprehensive study published by Hawaii itself (Department of Planning and Economic Development, "The Economy of Hawaii" (1969)). The study points out that during the very time Hawaii contends in this case its "economy has been held in a state of arrested development" (App. 65), its economy in fact dramatically expanded (pp. 3, 5):

> "Dramatic as the Nation's economic expansion has been, Hawaii's has been more dramatic. Further, this expansion has been shared in some degree by all sectors of Hawaii's economy.
>
> "Indeed, Hawaii has experienced a population and labor force explosion, and yet the State's unemployment rate has been consistently below the national rate. In consequence, Hawaii's production of goods and services and its personal income have expanded much faster than the Nation's.
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> • • • • •
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> "The most rapid population growth continues to be in Honolulu. But the Neighbor Islands are also growing, and recent developments seem to forecast rapid expansions of their economies in the years ahead."

The study goes on to point to the most impressive factors of growth. Hawaii's population expanded 24 per cent between 1960 and 1968, twice the national rate. The Department referred to this growth as "phenomenal" (pp. 7, 8). Since 1963, Hawaii's unemployment "remained below 4 per cent of the state's total labor force—a low rate by mainland standards and one which attests to the promptness with which newcomers have been absorbed into employment roles" (p. 9). Hawaii's unemployment rate in September 1968 was only 2.7 per cent. The Department commented: "Instead of too few jobs, as in the early post World War II years, Hawaii in recent years has been experiencing a growing labor shortage" in spite of a labor force which increased by 20 per cent between 1961 and 1967 (p. 9). Large employment expansions occurred, for example, in the research and development, computer services, communications, transportation equipment, investment, insurance, banking, medical and tourist-related industries (p. 16).

The Department stated that "the rapid increase in workers, and employment, in Hawaii has been accompanied by rapid increases in the State's output of goods and services" (p. 17). Thus, Hawaii's gross product, "the value of all goods produced and all services performed by the state's economy," rose from approximately $1.9 billion in 1961 to $2.9 billion in 1967, an increase of more than half in six years.

"sitting as a court of equity," did not, as *parens patriae,* seek treble damages under the Clayton Act. Rather, it sought "token damages" for alleged injury to its general economy and prosperity for the very reason that actual damages would be impossible to ascertain. Count 2 of Georgia's amended complaint—its *parens patriae* count—stated:

> "It is likewise impossible accurately to calculate the damage done to the people of Georgia over the decades as an organized community as a direct result of the acts of the defendants complained of herein. * * * It is respectfully requested that the Court award the State of Georgia token damages as a representative of the people—as a quasi-sovereign—in an amount which the State of Georgia submits should not be less than five million dollars."

In its brief in this Court Georgia conceded that the alleged injury to the state as quasi-sovereign "transcends measurement in pecuniary terms" and is "perhaps incapable of estimate in money" (Brief on Behalf of the State of Georgia on Motion to File Amended Bill of Complaint, pp. 7, 29).

The question is not one of proof. The effort fails at the threshold. Although the Clayton Act gives broad leeway in ascertaining and fixing damages, it does so only after a plaintiff has established himself upon a solid platform, namely, that there has been injury to him in his "business or property." There must, at least, be that platform. When Congress has prescribed the basic prerequisite that the injury must be to one "in his business or property," it may not be presumed that by the qualifying phrase Congress meant nothing at all and intended to allow recovery of damages for any kind of injury.

Hawaii may recover damages sustained by it in its proprietary capacity. So also can its citizens, individually or in appropriate class actions, recover for injury to their business or property. These two categories of claims comprise all of the damages resulting from injury to the business or property of anyone — the state and all its citizens. In seeking more, Hawaii and the *amici curiae* should address their arguments to Congress, where they may be subjected to consideration by the kind of machinery best adapted to the matter—legislative committees and the rest of the apparatus of the legislative process (*Lauritzen v. Larsen* (1953) 345 U.S. 571, 593). The words of the court below bear repeating (App. 106):

> "Compensation of the public (let alone treble damages) for injury of such an extraordinary character presents policy questions which, in our view, should be subjected to close Congressional inquiry and study. We do not believe that § 4 as it now stands can be construed to make such recovery available."

4. THE RELIANCE OF THE PETITIONER ON GEORGIA v. PENNSYLVANIA R. CO. IS MISPLACED.

Georgia, in its bill of complaint in the *Georgia* case, prayed for damages under section 4 of the Clayton Act only in its capacity as proprietor, a claim which was treated by this Court as a makeweight, and was later waived by Georgia. In its *parens patriae* count, Georgia did not, as noted above, seek "damages" in a legal sense, but prayed for "token damages" only for the very reason that actual damages would be impossible to ascertain.

Far from considering or passing on the question whether treble damages under section 4 of the Clayton Act are recoverable in a *parens patriae* action this Court in *Georgia* specifically confined its ruling to the question of equitable relief, as the court below recognized (App. 103-104). After

quoting from section 16 of the Clayton Act, the Court said: "It must be remembered that this is a suit to dissolve an illegal combination or to confine it to the legitimate area of collaboration" (324 U.S. 460). The Court then stated (p. 462):

> "Dissolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here."

The district court in *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D. Pa. 1969) 309 F.Supp. 1057, appeal dismissed (3 Cir. Feb. 2, 1970), in denying leave to the States of California and Kansas to amend their complaints and add *parens patriae* counts, had occasion to consider the scope of this Court's ruling in the *Georgia* case. It correctly observed that no issue with respect to the right of a state in its quasi-sovereign capacity to recover treble damages under the Clayton Act was before this Court (pp. 1061-1062):

> "Nor does the *Georgia* case, *supra,* itself lend any support to the type of damage claim for which leave to amend is here sought. In fact, in the only '*parens patriae*' claim considered by the Court in its opinion, that set forth in Count 2 of Georgia's complaint, Georgia did not even seek damages on behalf of individual citizens, nor for that matter treble damages under the antitrust laws at all, though it did seek treble damages in its proprietary capacity under Count 3 of its complaint. For in its prayer for relief set forth at pages 24-27 of its complaint, Georgia requested as damages under Count 2, that it be awarded 'token' damages in the amount of five million dollars as a representative of the public as damages for harm and injury to the economy of the state as a whole."

In light of the foregoing it is difficult to find a basis for the surprising conclusion of the district court in the case at bar that this Court in *Georgia* (App. 93):

> "• • • clearly • • • differentiated between suits for damages in the State's proprietary capacity and suits for damages in its quasi-sovereign capacity and held that damages to the State's economy, if proved, were recoverable as a distinct injury, severable from whatever injury it might suffer in its proprietary capacity."

We inquire, then, on what basis the district court concluded—and petitioner and *amici* here contend—that the *Georgia* case "holds" that a state may, in its capacity as *parens patriae,* sue to recover treble damages under the Clayton Act for injury to its general economy, "as a distinct injury, severable from whatever injury it might suffer in its proprietary capacity" (Br. 45-46).

The district court and petitioner here rely solely upon the use by this Court of two plural nouns in the course of its opinion upholding Georgia's standing to sue for an injunction. The district court, adding its own emphasis, quoted from the opinion in *Georgia* (App. 85-86):

> "[W]hen it came to other [than criminal] *sanctions* Congress • • • authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil *remedies,* it restricted the States to suits to protect their proprietary interests.
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> • • • • •
>
> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil *sanctions* of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action [for an injunction] to this Court fail."

Hawaii asserts that "the use of the plural form in all of these [two] words cannot be regarded as coincidental, especially in light of the substantial request for damages of at least five million dollars which Georgia made as *parens patriae*" (Br. 41-42). The damages requested by Georgia as *parens patriae* may indeed have been substantial, but as *parens patriae* Georgia specifically refrained from requesting treble damages under section 4 of the Clayton Act. And no claim such as Hawaii asserts here was before the Court.

Two plural nouns, used incidentally in the course of an opinion, do not constitute a "holding." "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents" *(Webster v. Fall* (1925) 266 U.S. 507, 511).[12] In *Georgia*, the question whether a state, suing as *parens patriae*, may recover treble damages under section 4 of the Clayton Act for an alleged injury to its general economy and prosperity did not even "lurk" in the record. No such claim was pleaded, considered by the Court, or anywhere mentioned.

Further, the context of the quoted passage at 324 U.S. 447 is inconsistent with the conclusion petitioner would draw from it. At that juncture of its opinion in *Georgia* the Court was answering the argument that only the Federal government is *parens patriae* to claims based on Federal law. In that connection and for that purpose it was speaking generally about all private suitors, not merely states. This is evident from the sentence immediately preceding what the district court quoted, viz.:

12. See also *Nashville Milk Company v. Carnation Company* (1958) 355 U.S. 373, 376, n. 5, and the dissenting opinion at 383.

> "The enforcement of the criminal sanctions of these acts [federal antitrust acts] has been entrusted exclusively to the federal government."

The following sentence quoted by the district court simply contrasted what was entrusted to the Federal government with what was entrusted to private suitors.

Petitioner and *amici curiae* concede, as they must, that this Court held in *Georgia* that Georgia could not recover damages. In attempting, nevertheless, to find in that decision a basis for a *parens patriae* suit for damages, they argue that the ground for denying damages was that the suit was one for discrimination in freight rates, and, say they, *Keogh v. C. & N.W. Ry. Co.* (1922) 260 U.S. 156, precludes recovery of damages in such a case (Br. 14-15, 42). That argument will not do. The opinion in *Georgia* does refer to the rule of *Keogh*, and that rule did bar Georgia from recovering damages. But this Court's ruling related to damages, if any, suffered by Georgia in its proprietary capacity, i.e., in its suit as a shipper (324 U.S. 435). The basis of the *Keogh* rule is that to award damages to a shipper for charging conspiratorial rates which have been approved by the Interstate Commerce Commission would be tantamount to giving him a preference illegal under the Act to Regulate Commerce. Said the Court in the *Keogh case* (260 U.S. 163):

> "The legal rights of *shipper* as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate as between carrier and *shipper*. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. * * * And they are not affected by the tort of a third party. * * * This stringent rule prevails, because otherwise the paramount purpose of Congress — pre-

> vention of unjust discrimination — might be defeated. If a *shipper* could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors" (emphasis added).

In *Georgia* the Court explains and applies *Keogh* in exactly this way, saying (324 U.S. 453):

> "The legal rights of a *shipper* against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between *shipper* and carrier and may not be varied or enlarged either by the contract or tort of the carrier. And it added * * *" (emphasis added)

then quoting from *Keogh* a passage just quoted above.

Obviously, that reasoning has no application to a *parens patriae* claim for damages to the "general economy or prosperity" of a state, for with respect to such a claim the state is not suing as a shipper. It is simply impossible to read into the discussion in *Georgia* any holding that a *parens patriae* suit for damages under the Clayton Act will lie for damages arising from all conspiracies under the Sherman Act except a railroad rate conspiracy.

II. INJURY MUST BE DIRECT BEFORE RECOVERY IS PERMISSIBLE UNDER THE CLAYTON ACT.

The second ground of decision by the court below is also in accordance with an unbroken line of authority under section 4 of the Clayton Act. As stated by the court (App. 106):

> "Accepting that the general economy can suffer injury from antitrust violations, such injury is indirect

and consequential to a degree and in a sense far beyond that usually discussed in this connection. It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act * * *.

"The attenuated injuries alleged by Hawaii fall far outside the area of directness contemplated by the Clayton Act."

Hawaii lays great stress upon an alleged confusion and inconsistency among lower Federal courts with respect to the standing of plaintiffs under section 4 (Br. 18-22). It asserts that the decision of the court below "not only reflects the judicially created chaos surrounding the question of standing under section 4, it proceeds to compound that confusion and further obfuscate standing considerations * * * and thereby weaken[s] the effectiveness of the treble-damage action as a means for enforcing national antitrust policy" (Br. 20).

There is no confusion or inconsistency among lower Federal courts on the question of standing as applied by the court below. Every restraint of trade, it might be argued, affects in some way and to some degree every person in the community. Thus it might be argued that a restraint against a manufacturer in some ways affects its suppliers, public bodies to which it pays taxes, merchants patronized by its employees, the community affected by its financial well-being and even the charities to which it might have made contributions. However, Congress did not vest a cause of action for treble damages in everyone who asserts some connection with an alleged restraint of trade, no matter how removed that connection may be.

This is not to say that section 4 should be narrowly or restrictively interpreted; but to state a cause of action under the statute it is not enough that an ultimate and

remote effect of allegedly illegal conduct, filtered through many layers of the economy, allegedly resulted in "injury." At some point, a line of demarcation must be drawn. This task has fallen on the Federal courts, and they have consistently held over many years that standing to sue under section 4 of the Clayton Act does not extend to persons who are only remotely affected by the alleged illegal activity.[13]

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13. Every circuit has recognized this rule:

First Circuit:
Miley v. John Hancock Mutual Life Insurance Co. (D.Mass. 1957) 148 F.Supp. 299, 303, affirmed (1 Cir. 1957) 242 F.2d 758, certiorari denied (1957) 355 U.S. 828; *Robinson v. Stanley Home Products, Inc.* (D.Mass. 1959) 178 F.Supp. 230, 233-34, affirmed (1 Cir. 1959) 272 F.2d 601; *Snow Crest Beverages v. Recipe Foods* (D.Mass. 1956) 147 F.Supp. 907, 909.

Second Circuit:
Billy Baxter, Inc. v. Coca-Cola Company (2 Cir. 1970) 431 F.2d 183, certiorari denied (1971) 401 U.S. 923; *Fields Productions, Inc. v. United Artists Corporation* (2 Cir. 1970) 432 F.2d 1010, certiorari denied (1971) 401 U.S. 949; *SCM Corporation v. Radio Corporation of America* (2 Cir. 1969) 407 F.2d 166, 170-171, certiorari denied (1969) 395 U.S. 943; *Productive Inventions v. Trico Products Corp.* (2 Cir. 1955) 224 F.2d 678, 679, certiorari denied (1956) 350 U.S. 936.

Third Circuit:
Kauffman v. Dreyfus Fund, Inc. (3 Cir. 1970) 434 F.2d 727, 732, 733-734, certiorari denied (1971) 401 U.S. 974; *Ash v. International Business Machines, Inc.* (3 Cir. 1965) 353 F.2d 491, 493-494, certiorari denied (1966) 384 U.S. 927; *Melrose Realty Co. v. Loew's, Incorporated* (3 Cir. 1956) 234 F.2d 518, certiorari denied (1956) 352 U.S. 890; *Harrison v. Paramount Pictures* (E.D.Pa. 1953) 115 F.Supp. 312, 317, affirmed (3 Cir. 1954) 211 F.2d 405, certiorari denied (1954) 348 U.S. 828.

Fourth Circuit:
South Carolina Council of Milk Producers, Inc. v. Newton (4 Cir. 1966) 360 F.2d 414, 419, certiorari denied (1966) 385 U.S. 934.

Fifth Circuit:
Dailey v. Quality School Plan, Inc. (5 Cir. 1967) 380 F.2d 484, 487-488; *Peter v. Western Newspaper Union* (5 Cir. 1953) 200 F.2d 867, 872-73; *Coast v. Hunt Oil Co.* (5 Cir. 1952) 195 F.2d 870, 872, certiorari denied (1952) 344 U.S. 836.

While results have varied depending upon the particular facts of each case, the principle under which these decisions were reached has remained uniform, and this Court has denied certiorari in at least sixteen cases involving application of the standing rule.[14] Contrary to Hawaii's assertion

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Sixth Circuit:
Volasco Products Company v. Lloyd A. Fry Roofing Company (6 Cir. 1962) 308 F.2d 383, 395, certiorari denied (1963) 372 U.S. 907; *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.* (6 Cir. 1961) 298 F.2d 356, 359.

Seventh Circuit:
Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co. (7 Cir. 1963) 315 F.2d 564, 566-567 certiorari denied sub nom. *Illinois v. Commonwealth Edison Co.* (1963) 375 U.S. 834.

Eighth Circuit:
Sanitary Milk Producers v. Bergjans Farm Dairy, Inc. (8 Cir. 1966) 368 F.2d 679, 688-689; *Duff v. Kansas City Star Company* (8 Cir. 1962) 299 F.2d 320, 323.

Ninth Circuit:
Hoopes v. Union Oil Company of California (9 Cir. 1967) 374 F.2d 480, 485; *Twentieth Century Fox Film Corporation v. Goldwyn* (9 Cir. 1964) 328 F.2d 190, 220, certiorari denied (1964) 379 U.S. 880; *Karseal Corporation v. Richfield Oil Corporation* (9 Cir. 1955) 221 F.2d 358, 363-65; *Conference of Studio Unions v. Loew's Inc.* (9 Cir. 1951) 193 F.2d 51, 54-5, certiorari denied (1952) 342 U.S. 919.

Tenth Circuit:
Nationwide Auto Appraiser Serv. v. Association of C. & S. Co. (10 Cir. 1967) 382 F.2d 925, 928-929.

14. *Billy Baxter, Inc. v. Coca-Cola Company* (2 Cir. 1970) 431 F.2d 183, certiorari denied (1971) 401 U.S. 923; *Kauffman v. Dreyfus Fund, Inc.* (3 Cir. 1970) 434 F.2d 727, certiorari denied (1971) 401 U.S. 974; *Mulvey v. Samuel Goldwyn Productions* (9 Cir. 1970) 433 F.2d 1073, certiorari denied (1971) ..... U.S. ..... (39 USLW 3456 April 19, 1971); *Fields Productions, Inc. v. United Artists Corporation* (2 Cir. 1970) 432 F.2d 1010, certiorari denied (1971) 401 U.S. 949; *SCM Corporation v. Radio Corporation of America* (2 Cir. 1969) 407 F.2d 166, certiorari denied (1969) 395 U.S. 943; *South Carolina Council of Milk Producers, Inc. v. Newton* (4 Cir. 1966) 360 F.2d 414, certiorari denied (1966) 385 U.S. 934; *Ash v. International Business Machines, Inc.* (3 Cir. 1965) 353 F.2d 491, certiorari denied (1966) 384 U.S. 927; *Twentieth Century Fox Film Corporation v. Goldwyn* (9 Cir. 1964) 328 F.2d 190,

of a generally narrow attitude on the part of the lower Federal courts, decisions involving standing have been marked by liberality. Indeed, as Hawaii has admitted, "it has been the Ninth Circuit itself which has led the way toward the more enlightened view of standing" under section 4 (Br. 58).[15]

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certiorari denied (1964) 379 U.S. 880; *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.* (7 Cir. 1963) 315 F.2d 564, certiorari denied sub nom. *Illinois v. Commonwealth Edison Co.* (1963) 375 U.S. 834; *Volasco Products Company v. Lloyd A. Fry Roofing Company* (6 Cir. 1962) 308 F.2d 383, certiorari denied (1963) 372 U.S. 907; *Miley v. John Hancock Mutual Life Insurance Co.* (1 Cir. 1957) 242 F.2d 758, certiorari denied (1957) 355 U.S. 828; *Productive Inventions v. Trico Products Corp.* (2 Cir. 1955) 224 F.2d 678, certiorari denied (1956) 350 U.S. 936; *Melrose Realty Co. v. Loew's, Incorporated* (3 Cir. 1956) 234 F.2d 518, certiorari denied (1956) 352 U.S. 890; *Harrison v. Paramount Pictures* (3 Cir. 1954) 211 F.2d 405, certiorari denied (1954) 348 U.S. 828; *Conference of Studio Unions v. Loew's Inc.* (9 Cir. 1951) 193 F.2d 51, certiorari denied (1952) 342 U.S. 919; *Coast v. Hunt Oil Co.* (5 Cir. 1952) 195 F.2d 870, certiorari denied (1952) 344 U.S. 836.

In the *Billy Baxter* case, first cited *supra*, the Court of Appeals for the Second Circuit said (431 F.2d 187):

> "While any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers, it has long been held that not all of these have the requisite standing to sue for treble damages and thereby take a leading role in the enforcement of the prohibition in question. * * * The private action, intended as 'an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws,' * * * can only serve as an effective deterrent if the courts are able to administer it with some degree of certainty. Contourless rules of causation would pose the threat of a parallel relaxation of the standard of business behavior enforced by the allowance of treble recovery. Consequently, a plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act" (citations omitted).

15. Citing *Mulvey v. Samuel Goldwyn Productions* (9 Cir. 1970) 433 F.2d 1073, certiorari denied (1971) ..... U.S. ..... (39 USLW 3456 April 19, 1971); *Hoopes v. Union Oil Company of California*

There is clearly no basis, then, for Hawaii's accusation that the decision of the court below reflects an "'anti-antitrust' attitude" (Br. 17). Nor is there any basis for Hawaii's conclusion that the court below "failed to recognize or even address itself to the more recent and enlightened line of" standing cases (Br. 58).[16] The court obviously was cognizant of and adhered to its own decisions on the subject. However, it is not surprising that, despite its liberal view of the standing rule, it found the injury alleged here to the general economy and prosperity of the state to be "indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection" and "far outside the area of directness contemplated by the Clayton Act" (App. 106). Indeed, it strains the imagination to think of claims of "injury" more filtered, indirect and remote than the seven specifications of "injuries" and "adverse effects" upon the state's general "economy and prosperity" alleged in Count Two of the complaint (*supra*, p. 3).[17]

(9 Cir. 1967) 374 F.2d 480; and *Twentieth Century Fox Film Corporation v. Goldwyn* (9 Cir. 1964) 328 F.2d 190, certiorari denied (1964) 379 U.S. 880. One would be hard pressed to find better examples of a consistently liberal attitude than in the decisions of the court below.

16. Hawaii also seeks to support its position with quotations taken out of context from *Mandeville Island Farms v. Sugar Co.* (1948) 334 U.S. 219; *Radovich v. Nat. Football League* (1957) 352 U.S. 445, 453-454; *Radiant Burners v. Peoples Gas Co.* (1961) 364 U.S. 656, 660; *Perma Mufflers v. Int'l. Parts Corp.* (1968) 392 U.S. 134 and *Lawlor v. National Screen Service* (1955) 349 U.S. 322 (Br. 17, 57). No one of these cases involved or discussed the issue of standing. Hawaii also cites *Perkins v. Standard Oil Co.* (1969) 395 U.S. 642 (Br. 48, 49). But in that case this Court recognized the standing rule, holding that plaintiff was "directly injured" by the price discrimination charged (395 U.S. 649-650).

17. Compare *Georgia v. Evans*, supra (316 U.S. 162-3), where this Court recognized the right of a state to sue for treble damages under section 4 "when it is the immediate victim" of an antitrust violation, thus putting states on a par with other purchasers so injured.

III. HAWAII HAS NO STANDING TO SUE AS PARENS PATRIAE EITHER FOR AN INJUNCTION OR FOR DAMAGES ARISING FROM THE ALLEGED WRONG SET OUT IN THE COMPLAINT HEREIN.

Over and beyond the sound and sufficient grounds stated by the court below and discussed in Point I above, Hawaii's claim as *parens patriae* is wholly wanting in merit for failure to state a claim justiciable in an action *parens patriae,* either for damages or for injunctive relief.

In this connection we reemphasize that in the very few instances in which this Court has sustained the extraordinary right of a state to sue in its capacity as *parens patriae* it has carefully noted that such suits lie only to protect the so-called "quasi-sovereign" interests of the state in the health, safety and welfare of its citizens as a whole — interests which a private party would have no standing to raise. Such interests, this Court has pointed out, are of a type which are "independent of and behind the titles of its citizens, in all the earth and air within its domain" (*Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230, 237); which "'affect the public at large, and are in respect of matters * * * concerning which the Nation owes the duty to all the citizens of securing to them their common rights'" (*Louisiana v. Texas* (1900) 176 U.S. 1, 19); which rise "above a mere question of local private right and [involve] a matter of state interest" (*Kansas v. Colorado* (1907) 206 U.S. 46, 99). They must be of a character which, absent the Union of states created by the Constitution, would be settled by diplomacy or war (*Missouri v. Illinois & Chicago District* (1901) 180 U.S. 208, 241); they must involve matters "of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected" (*Penna. v. West Virginia* (1923) 262 U.S. 553, 592). The "State

must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest" (*Oklahoma v. Cook* (1938) 304 U.S. 387, 396).

The complaint in this case alleges a conventional anti-trust suit, a conspiracy to fix prices on a consumer product. The wrong, if one be proved, falls directly upon the purchasers of the product, including the State of Hawaii as a buyer. Such purchasers, including the State of Hawaii in its proprietary capacity, are the real parties in interest. Each has a ready and specific remedy provided by the statute which creates the wrong, including the right to bring proper class actions under Rule 23. The above and other decisions of this Court extending over the course of nearly 100 years make it clear that such a complaint does not state a cause of action which a state may assert *parens patriae*, either for damages or for an injunction. This is immediately evident if the allegations of the complaint in the case at bar are compared with those in *Oklahoma v. A., T. & Santa Fe Ry.* (1911) 220 U.S. 277.

In the *Oklahoma* case, the State of Oklahoma filed a bill of complaint seeking to invoke the original jurisdiction of this Court. Whether such a suit would lie turned—as does the present case—upon the question whether the bill of complaint alleged a cause of action possessed by the state *qua* state. The bill alleged that the defendant railroads were charging the inhabitants of Oklahoma excessive rates on crude and refined oil, lime, cement, plaster, brick and stone. It then alleged (220 U.S. 283-284):

> "That the State of Oklahoma at this time has about two million inhabitants, is developing and building towns, villages and individual farmhouses, and that lime, cement, plaster, brick and stone are very essential to its growth; that at this time in the State of Oklahoma

there are very large and extensive petroleum oil wells, and the manufacture or refining of the same is an industry continually growing in said State; that the transportation rates on crude and refined oil, lime, cement, plaster, brick and stone are very important and essential to the development of said State; and, that the violation by said respondent of the said conditions of said grant is a menace to the future of said State.'"

And the bill further alleged (220 U.S. 284):

"* * * that if the defendant was permitted further to operate the railroad in violation of the condition of the grant it would be a hindrance to the growth of the State, as well as an injury to the property rights of its inhabitants."

This Court dismissed the suit. It quoted from *Louisiana v. Texas* (1900) 176 U.S. 1, the test for determining whether a complaint states a cause of action which can be asserted by a state as *parens patriae* (220 U.S. 288):

"'* * * it must appear that the controversy to be determined is * * * not a controversy in the vindication of grievances of particular individuals. * * * But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the mal-administration of the laws of another.'"

And held (220 U.S. 289):

"These doctrines, we think, control this case and require its dismissal as not being within the original jurisdiction of this court as defined by the Constitution."

Further, notwithstanding the conclusional allegations in the bill of complaint of hindrance to the growth of the

state—allegations which are substantially identical to those in the case at bar—this Court rejected the view (220 U.S. 289):

> "• • • that jurisdiction could be invoked by a State, bringing an original suit in this court against foreign corporations and citizens of other States, whenever the State thought such corporations and citizens of other States were acting in violation of its laws to the injury of its people generally or in the aggregate; although, an injury, in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of States could be reached, without the intervention of the State, by suits instituted by the persons directly or immediately injured."

And the Court concluded (220 U.S. 289):

> "We are of opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be a party,' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people • • •."

Petitioner says that this ruling is no longer authoritative because of this Court's later decision in *Georgia v. Pennsylvania R. Co., supra.* This is not so. In *Georgia* this Court carefully distinguished and expressly approved and reaffirmed its ruling in *Oklahoma* (324 U.S. 451-452):

> "*Oklahoma v. Atchison, T. & S.F.R. Co., supra,* is not opposed to this view. • • • Oklahoma sued • • • to enjoin • • • the exaction of greater rates than the maximum rates specified. • • • The Court held that our original jurisdiction could not be invoked by a State merely because its citizens were injured. We

adhere to that decision. It does not control the present one. This is no attempt to utilize our original jurisdiction in substitution for the established methods of enforcing local law. This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers."

What, then, was the "gravamen" of the charge in the *Georgia* case which distinguished it from the complaint in *Oklahoma* and also, in turn, from the complaint in the case at bar?

In *Georgia,* the amended bill alleged that the 20 principal railroads operating throughout the United States east of the Mississippi River, and 60 rate bureaus and related agencies, had united to fix rates and charges on transportation to and from Georgia, so as to discriminate against Georgia *as a state,* thus denying Georgia's products equal access with those of other states to the national market and restricting the state's manufacture, shipping and commerce. These allegations were crucial to the decision of the majority. The Court said (324 U.S. 445):

"• • • we construe the allegation • • • as a charge that defendants have conspired to fix rates so as to discriminate against Georgia."

And, for emphasis, it repeated (324 U.S. 462):

"As we have said, we construe the bill to charge a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed. We hold that under that construction of the bill a cause of action under the anti-trust laws is alleged."

This kind of extraordinary allegation—of a conspiracy aimed at the state *as such* to erect, by coercion, a trade barrier around the state—this Court felt fitted the category of injury to the state in its capacity as *parens patriae* (324 U.S. 450-451):

> "The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. * * * Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative. * * *
>
> "If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. * * * Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected."[18]

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18. The Special Master in *Georgia* (Lloyd K. Garrison) found that the evidence wholly failed to support the extraordinary allegation that Georgia had been the victim of a conspiracy directed against it as a state. In consequence, he found that Georgia had no standing to sue *parens patriae* (Report of the Special Master, pp. 201, et seq.).

Shortly after this Court's decision in *Georgia*, Congress passed the Bulwinkle Act (62 Stats. 472) giving the Interstate Commerce Commission authority to approve combinations of the character in-

No such allegation—of a throttling conspiracy directed against the state as such—is or could be made in the instant case. The complaint alleges simply that three of the seven companies selling petroleum products in Hawaii conspired to fix the prices of such products.[19] If this charge be proved, the direct impact of the conspiracy falls upon Hawaii in its proprietary capacity as a purchaser of petroleum products and upon other buyers of such products. Each purchaser has an immediate, conventional remedy to enjoin the alleged conspiracy and to recover treble damages. *Oklahoma* establishes and *Georgia* confirms that such a complaint does not state a cause of action *parens patriae*. *Oklahoma* establishes and *Georgia* confirms that the court will look through general and conclusional allegations of injury to the economy and prosperity of a state to see what in truth is the gravamen of the charge in the complaint. And where, as here, the cause of action alleged is simply a wrong directed at individual citizens, including the state in its proprietary capacity, general allegations added in the complaint of injury to the

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volved in the *Georgia* case and thereby immunize them from the antitrust laws (see *Pan American World Airways v. U.S.* (1963) 371 U.S. 296, 306, fn. 11).

The *Georgia* case was dismissed *per curiam*, by consent of all parties, after the Master's Report was filed (339 U.S. 975) but before it was considered by the Court (340 U.S. 889).

Of this case Professor Freund has since remarked:

> "Whatever strategic end may have been achieved through the earlier overruling of a motion to dismiss * * * the complete inability of the state to make good its claim of injury as *parens patriae* suggests that in the future the Court may be more wary of sweeping allegations of detriment to a state's economy as a basis of a case or controversy" (Freund, Book Review (1951) 3 J.Leg.Ed. 643, 644, n. 2).

19. Texaco, Phillips (formerly Tidewater), Time and Armour also market petroleum products in Hawaii (App. 42).

economy of the state will not be held to convert an ordinary tort action into a suit which the state has standing to assert as *parens patriae*.

IV. PETITIONER'S CONTENTION THAT THE CITIZENS OF HAWAII HAVE NO PRACTICAL REMEDY IS WITHOUT BASIS.

Petitioner argues that "respondents have predatorily preyed upon the numerous petroleum product consumers in Hawaii" (Br. 26) and that, by dismissing the class action count (Count Three), the district court recognized "that the individual citizen-consumers of the products involved • • • have no practical or effective individual remedy in their own right," so that "the present action by the State of Hawaii, as *parens patriae*, • • • becomes the only meaningful and effective alternative to permitting the respondents to retain nearly all or a substantial portion of the illicit profits which they derived from their illegal price fixing conspiracy" (Br. 11, 13-14). The argument permeates the brief (e.g., Br. 4, 5, 18, 22-27). Not only is it unsound for the reasons discussed in the text above, it has no factual basis in the record. The district court did not rule that a proper class action or actions are not possible, and no such question was presented to it. It decided only that a class composed of every purchaser of petroleum products in Hawaii was unmanageable. Its ruling was without prejudice (App. 80). At the very moment when the district court stated that it would certify its *parens patriae* ruling for interlocutory appeal, the court offered to certify its class action ruling for simultaneous interlocutory appeal, and petitioner rejected the offer (App. 81).

Arguments similar to those made by Hawaii were considered and rejected in the *Philadelphia Housing Authority* case, *supra*,[20] and by the district court in the present case.[21]

We recognize that the allegations of conspiracy in the complaint, although denied, must be accepted as true for the purposes of a motion to dismiss. But petitioner indulges in constant immoderate characterizations of respondents' conduct in a manner nowhere alleged in the complaint: "enormous profits," "millions of dollars in illicit profits" extracted from Hawaii by a "monumental illegality and wrong-doing" involving "flagrant" wrongs in which respondents "preditorily preyed" upon Hawaii's consumers (e.g., Br. 13, 14, 22, 24, 26, 65). We therefore think it not inappropriate to point

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20. "But plaintiffs contend that if this Court denies them the right to amend their complaints so as to assert [*parens patriae*] claims to recover damages on behalf of individual citizen-consumers, those citizens with small stakes in this massive litigation will have no adequate remedy to vindicate their rights against defendants. • • • For they contend that the individual citizens cannot as a practical matter sue for themselves or get an adequate remedy in situations like those of the present cases.

"The Court cannot accept plaintiffs' argument. In the 113 cases now before this Court for pretrial proceedings, there are numerous cases in which various plaintiffs claim the right to represent as classes under Rule 23 individual homeowners, owners of apartment houses, owners of commercial buildings and others at the consumer-level alleged to have sustained injury. • • • Rather than provide a remedy to small-stake consumers allegedly denied by reasons of practicality the opportunity to bring actions available to other class action plaintiffs, allowance of the proposed claims would simply permit circumvention of the restrictions to which other class action plaintiffs are subject" (309 F.Supp. 1062-63).

21. "Thus the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The two *theories for recovery* of damages are separate and distinct" (App. 88-89).

out that documents produced by petitioner in the district court disclose that the Antitrust Division of the Department of Justice conducted an investigation of gasoline prices in Hawaii without taking any action, and that the Federal Trade Commission, although requested by the Deputy Attorney General of Hawaii to investigate the gasoline industry in Hawaii, refused to do so "especially in the absence of any evidence which would indicate the presence of unlawful practices."[22] The letter of the Deputy Attorney General of Hawaii requesting this investigation, dated March 23, 1965, stated, "we have no evidence of price fixing at any level * * *."

22. Letter of Federal Trade Commission dated April 6, 1965.

CONCLUSION

For each of the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

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August 16, 1971.

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OCTOBER TERM, 1971

No. 70-49

STATE OF HAWAII, *Petitioner*,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

PRELIMINARY STATEMENT

Respondents present four basic arguments challenging petitioner's standing herein. They contend: (1) that Congress, in enacting Section 4, did not intend to authorize suits by a State as *parens patriae;* (2) that *parens patriae* suits would permit double recovery against antitrust

violators; (3) that the injury to petitioner, its consumer-citizens and its economy is indirect and incapable of calculation; and (4) that the individual consumers injured by antitrust violations have an effective alternative remedy.

As will be demonstrated below, none of these contentions can withstand close analysis or scrutiny.

ARGUMENT

I. CONGRESSIONAL INTENT—AS CONSTRUED IN GEORGIA v. PENNSYLVANIA R. CO., 324 U.S. 439 (1945)—AND THE NATIONAL COMMITMENT TO THE VIGILANT AND EFFECTIVE ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS SUPPORT PETITIONER'S STANDING AS PARENS PATRIAE HEREIN.

This Court has recently stated: "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). See also: *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) and *Bivens v. Six Unknown Named Agents*, ____ U.S. ____, 91 S.Ct. 1999 (1971). In the cited cases, this Court permitted the recovery of money damages arising out of violations of federal statutes and constitutional provisions even though Congress had not specifically authorized the remedy of damages. The Court correctly reasoned that the damage remedy was necessary to effectuate the national policies embodied in the federal statutes and constitutional clauses involved. These same considerations are relevant here.

In our present case, taking the allegations of the complaint to be true, respondents have violated the federal

antitrust statutes through an extensive program of price-fixing. By its very nature, the illegality was spread among millions of consumers of refined petroleum products in the State of Hawaii. The respondents—recognizing that no possible private remedy for full recovery of antitrust damages exists under the circumstances—now urge this Court to interdict the only meaningful and effective remedy available. In other contexts, such arguments have been categorically rejected. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

This Court ruled in *Georgia v. Pennsylvania R. Co.*, *supra*, that when Congress fashioned the civil antitrust remedies, it did not intend to exclude *parens patriae* suits from the purview of the antitrust acts. 342 U.S. at p. 447.

In response to this, respondents contend that *parens patriae* actions are limited to those seeking equitable relief. In so arguing respondents fail to recognize and appreciate the dual policies which warrant *parens patriae* actions:

(1) That certain wrongs are so widespread and so injuriously affect the population, prosperity and well-being of the State as to constitute an independent wrong against the State; and

(2) That some wrongs adversely affect such a large portion of the State's citizenry as to justify a *parens patriae* action by the State as trustee and guardian of its citizens who are otherwise without an effective remedy.

Both of these policy considerations are relevant in this case; hence, petitioner's standing as *parens patriae* is justified on both grounds.

Moreover, in view of these policies, it makes no sense to limit the State to equitable remedies. The State must be able to utilize all of the appropriate remedies to vindicate the federal rights which respondents have infringed. To reiterate: the evidence of a statutory right [under the federal antitrust laws] implies the existence of *all* necessary and appropriate remedies. In the present case, confining petitioner to its equitable remedies would be grossly inadequate in redressing the wrongs which respondents have perpetrated. Only money damages can compensate the State and its citizen-consumers for the revenues which respondents, by their illegal price-fixing scheme, have extracted. And money damages, which remove some of the profit incentive from price-fixing, constitute the most effective deterrent against such violations.

Respondents' attempt (brief, pp. 25-26) to distinguish antitrust standing requirements for injunctive relief (Section 16) and damages (Section 4) is without merit. Respondents can cite no authority for this distinction except the erroneous ruling of the Court below. On the other hand, as was established in petitioner's opening brief (pp. 37-40) filed herein, the identity of purpose which underlies both Sections 4 and 16 makes it clear that these two different remedies are but alternative (and, more often, cumulative) means of protecting the same interests and promoting the same national policies: the vigilant and effective enforcement of federal antitrust laws. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-133 (1969). In considering antitrust standing and enforcement, logic would prohibit granting petitioner standing for equitable relief while denying it standing to seek compensatory damages.

This Court, therefore, must recognize the propriety of the money damages remedy which, under the circumstances of this case, is necessary to effectuate the policies underpinning the substantive provisions of the federal statutes which defendants have violated. *Bivens v. Six Unknown Named Agents, supra; J. I. Case Co. v. Borak, supra.*

II. RECOGNITION OF PETITIONER'S STANDING, AS PARENS PATRIAE, TO RECOVER DAMAGES WOULD NOT SUBJECT RESPONDENTS TO THE THREAT OF DUPLICATIVE RECOVERY.

In their brief (at p. 11) respondents raise arguments which manifest their failure to comprehend the nature of *parens patriae* suits under the antitrust laws. Respondents discuss the "possibility" of being sued by consumers as well as the State and ask whether the State has "expropriated" the claims of its citizens. The irrelevance of respondents' contentions is easily demonstrated by reference, once again, to the two alternative theories which support petitioner's prayer for damages herein.

First. Georgia v. Pennsylvania R. Co., supra, establishes that a discriminatory price-fixing conspiracy in one of the major industries within a state (as is alleged in our case) constitutes an independent injury to the State which may be redressed through a suit *parens patriae.* In their brief (pp. 19, 20), respondents clearly concede petitioner's independent interest by quoting from *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907): ". . . In that capacity the State has an interest independent of and behind the titles of its citizens. . . ."

On this basis, the right of the State of Hawaii to seek damages in its *parens patriae* capacity for injury to its economy is one which exists independently of the rights of its citizens. As demonstrated in petitioner's opening brief, *Georgia v. Pennsylvania R. Co. supra,* would have allowed recovery of damages on this basis but for the conflicting Interstate Commerce Act policy which would have characterized any such recovery by the State as a discriminatory and prohibited rebate. Thus, the injury was one to an interest of the petitioner's which is legally protected under the antitrust laws—hence "property" within the meaning of Section 4 of the Clayton Act. *Walden v. British Petroleum Co.,* 231 F.Supp. 72 (S.D. N.Y. 1964).

Second. Under the alternative theory of *parens patriae* recovery, the State of Hawaii may collect damages as trustee, guardian and protector of its injured consumer—citizens who are otherwise without an effective remedy. In this context, the State would be obtaining compensation in its citizens' behalf. There is no possibility of duplicative recovery against respondents in that the money collected by the State as trustee satisfies the claims of the citizen-consumers who are in fact the beneficiaries of that trust.

Respondents' statement concerning the State's "expropriation" of the private claims is wholly without merit and irrelevant to this case. There is no "expropriation" because the State will hold and utilize any recovery for the benefit of the citizens involved. Respondents, in their citation of and quotation from *Louisiana v. Texas,* 176 U.S. 1 (1900) (brief, p. 19) seem to concede the "trus-

tee'' standing of the State as *parens patriae*. Any differences which may arise in the administration of the trust fund are between the State and its citizens and have no bearing on the present lawsuit. For example, the State may permit any citizen to file his specific claim for private losses incurred and be paid out of the fund, the unclaimed portion then escheating to the State. Or, the funds could be used by the State to minimize health hazards generated by air pollution which has resulted from the use of respondents' products. In any event, these are matters to be resolved in the future by the State of Hawaii and its citizens; the questions are not appropriately raised in the present proceeding.

Finally, the question of duplicative recovery by citizens and the State is completely moot here because the statute of limitations has expired as to the relevant damage period (1962-1966) and no consumer antitrust actions have been filed against respondents. Thus, the only possible remedy which now exists for redressing the injuries wrought by respondents' flagrant price-fixing scheme is that sought in our present case. If petitioner's standing to seek damages is not recognized, respondents will be allowed to retain the illicit profits of their antitrust violation.

Thus, the arguments of the respondents, raising the spectre of an impossible duplicative recovery—or recovery as a ''fine'' or ''punishment'' (brief, pp. 11, 12)—must be seen for what they are: smokescreens intended to distract the Court. Petitioner does not here seek a ruling which would permit ''double recovery,'' or recovery of a ''fine,'' but rather a ruling which would prohibit anti-

trust violators from retaining their illegal profits and avoiding any payment of damages whatsover.

III. THE INJURY TO PETITIONER, IN ITS PARENS PATRIAE CAPACITY, IS NOT INDIRECT OR REMOTE; NOR IS THE INJURY INCAPABLE OF MEASUREMENT IN DAMAGES.

A. The Direct Impact Of The Respondents' Antitrust Violation Upon Petitioner.

Respondents correctly state that the Ninth Circuit has led the way toward the more enlightened view of antitrust standing. This has been achieved by that Court's recognition that any antitrust plaintiff whose injury was a *foreseeable* result of the defendants' wrongdoing has standing to redress his injury under Section 4 of the Clayton Act.[1] The respondents fail to recognize, however, that the decision of the Ninth Circuit Court below in our present case represents an unexplained departure from the otherwise enlightened approach of that Circuit on the question of the standing of antitrust plaintiffs.

Under either theory of *parens patriae* recovery here alleged, the injury to petitioner was clearly a foreseeable result of respondents' conduct. First, respondents must have known that a price-fixing scheme which resulted in the artificial inflation of prices in a major industry (petroleum) would cause a misallocation of economic

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[1] At pages 36-37 of their brief, respondents cite numerous antitrust standing ("target area") cases and state, incredibly: "There is no confusion or inconsistency on the question of standing as applied by the Court below." But compare: *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970) and *Fields Productions, Inc. v. United Artists Corp.*, 432 F.2d 1010 (2nd Cir. 1970).

resources injurious to the economy and prosperity of the State. Indeed, the economy of the State of Hawaii was not only the "target area" of respondents' violation, but, moreover, its precise battleground.

Second, the losses of revenue suffered by the citizen-consumers of Hawaii who were required to pay the illegally inflated prices were likewise the foreseeable and, indeed, intended results of respondents' illegality.

Thus, under either theory of recovery, petitioner has standing to maintain this action for damages as *parens patriae*. The losses suffered are of the type which the antitrust laws seek to prevent.

B. The Injury To Petitioner As Parens Patriae May Be Calculated In Damages.

Respondents (brief, p. 29) make much of the fact that in *Georgia v. Pennsylvania R. Co., supra,* the State sought "token damages" (in the amount of five million dollars). This fact is used as the cornerstone of respondents' most desperate argument: even if they violated the law and illicitly extracted millions of dollars from the economy and citizen-consumers of the State of Hawaii, this money cannot be recovered because the precise amount of the damages cannot be ascertained in dollars and cents.

This and similar arguments have been totally emasculated by such decisions of this Court as *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), which respondents fail to discuss (or even cite) in their brief.

Again, the respondents' position crumbles when viewed against the two alternate theories of recovery in this case.

Petitioner, suing as trustee of its citizen-consumers, is entitled to recover the full amount of the overcharge to them which occurred as a result of respondents' price-fixing conspiracy. Assuming that respondents comply with the duties and responsibilities imposed upon them by the pre-trial discovery requirements of the Federal Rules of Civil Procedure, proving the amount of the losses suffered by the citizen-consumers would present none of the difficulties raised in respondents' brief.

Under the theory of recovery upheld in the District Court—relief for independent injury to the economy—*Bigelow* commands that flexibility in the admission of evidence be allowed. There are now available computerized and other scientific means for calculation of such damages. In this respect, the amount of the overcharge is the evidentiary starting point for computing the injury to the economy. As demonstrated in petitioner's opening brief (pp. 49-56), the State, through the use of expert testimony and other evidence, will be able, within the standards articulated by this Court, to establish its injury in dollars and cents. Respondents' factual arguments (brief, pp. 27-28) concerning Hawaii's present economic development must be addressed to the jury rather than this Court. The jury, after weighing the relevant economic data, must be permitted to determine the issue of damages.

Respondents' contention (brief, p. 27) that no jury could comprehend this type of damage computation is easily rebutted:

> "Juries, being gifted with the power to put a dollar value on a person's reputation, or his eyesight, or

his wife's affections, or even his life itself, should have little trouble with so relatively simple a proposition as measuring in dollars the amount of injury a monopolist . . . or a conspirator has inflicted upon his victim's business or property." Rowley, *Proof of Damages in Antitrust Cases*, 32 A.B.A. Antitrust L.J. 75 (1966).

IV. THIS ACTION BY PETITIONER AS PARENS PATRIAE IS THE ONLY EFFECTIVE MEANS FOR REMEDYING THE INJURIES AND ECONOMIC LOSSES CAUSED BY RESPONDENTS' ILLEGAL PRICE-FIXING CONSPIRACY.

Respondents' argument that *parens patriae* be rejected as a means of recovering antitrust damages in favor of a remedy which is more effective requires no extensive reply. Surely, antitrust defendants advance such an argument tongue-in-cheek.

The antitrust violation alleged here is a consumer-oriented price-fixing conspiracy. By its very nature, such a scheme victimizes a wide number of private citizens who are purchasers of mass distributed products (here, motor gasoline and other refined petroleum goods).

Few consumers are injured in a sufficient amount as to justify major and costly antitrust litigation. And, as respondents concede in their brief (p. 48), the District Court below ruled that a class action involving all consumers would be judicially unmanageable.

These considerations are magnified by the additional fact that the statute of limitations has now elapsed, barring any private consumer antitrust actions against respondents arising out of the alleged conspiracy herein. The present action constitutes the *only judicially manage-*

able remedy for fully redressing respondents' alleged price-fixing violation during the relevant time period stated in the complaint. If petitioner's standing is not recognized, respondents will be aided in retaining the fruit of their illicit conspiracy.[2]

CONCLUSION

For the reasons stated above, as more fully set forth in petitioner's opening brief, the judgment below of the United States Court of Appeals for the Ninth Circuit must be reversed.

Dated, San Francisco, California,
October 1, 1971.

Respectfully submitted,

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[2]Respondents improperly raise the factual argument of the existence of their alleged price-fixing conspiracy (brief, pp. 49-50). Respondents are well aware that such is not an issue before this Court and that for purposes of the present proceeding, the allegations of the complaint including the existence of a price-fixing conspiracy must be accepted as true.

Accordingly, petitioner does not accept respondents' implied invitation to burden this Court with a synopsis of the extensive evidence supporting the allegation of respondents' price-fixing scheme.

HAWAII v. STANDARD OIL CO. OF CALIFORNIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–49. Argued October 21, 1971—Decided March 1, 1972

Section 4 of the Clayton Act does not authorize a State to sue for damages for an injury to its general economy allegedly attributable to a violation of the antitrust laws. Pp. 257–266.

431 F. 2d 1282, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 266. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined *post*, p. 270. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Maxwell M. Blecher argued the cause for petitioner. With him on the briefs were *Bertram Kanbara*, Attorney General of Hawaii, *Hiromu Suzawa*, Acting Attorney General, *George Pai*, Deputy Attorney General, *Joseph L. Alioto*, and *Peter J. Donnici*.

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Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General of California, and *Anthony C. Joseph*, *Robert Murphy*, *Herbert Davis*, *Michael I. Spiegel*, and *Carole A. Kornblum*, Deputy Attorneys General, for the State of California, and by the Attorneys General and other officials for their respective States and jurisdictions as follows: *William T. Baxley*, Attorney General of Alabama, *Gary K. Nelson*, Attorney General of Arizona, *Ray Thornton*, Attorney General of Arkansas, *Duke W. Dunbar*, Attorney General of Colorado, *Robert K. Killian*, Attorney General of Connecticut, *W. Laird Stabler, Jr.*, Attorney General

of Delaware, *Robert L. Shevin*, Attorney General of Florida, *W. Anthony Park*, Attorney General of Idaho, *William J. Scott*, Attorney General of Illinois, *Richard C. Turner*, Attorney General of Iowa, *Vern Miller*, Attorney General of Kansas, *John B. Breckinridge*, Attorney General of Kentucky, *Jack P. F. Gremillion*, Attorney General of Louisiana, *James S. Erwin*, Attorney General of Maine, *Robert H. Quinn*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Warren Spannaus*, Attorney General of Minnesota, *John C. Danforth*, Attorney General of Missouri, *Robert L. Woodahl*, Attorney General of Montana, *Robert List*, Attorney General of Nevada, *Warren B. Rudman*, Attorney General of New Hampshire, *George F. Kugler, Jr.*, Attorney General of New Jersey, *David L. Norvell*, Attorney General of New Mexico, *Louis J. Lefkowitz*, Attorney General of New York, *Helgi Johanneson*, Attorney General of North Dakota, *William J. Brown*, Attorney General of Ohio, *Larry Derryberry*, Attorney General of Oklahoma, *Richard J. Israel*, Attorney General of Rhode Island, *Gordon Mydland*, Attorney General of South Dakota, *David M. Pack*, Attorney General of Tennessee, *Crawford C. Martin*, Attorney General of Texas, *Vernon B. Romney*, Attorney General of Utah, *James M. Jeffords*, Attorney General of Vermont, *Andrew P. Miller*, Attorney General of Virginia, *Slade Gorton*, Attorney General of Washington, *Chauncey H. Browning, Jr.*, Attorney General of West Virginia, *Robert W. Warren*, Attorney General, and *George F. Sieker*, Assistant Attorney General, of Wisconsin, and *J. Lee Rankin* of the City of New York.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented by this case is whether § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, authorizes a

State to sue for damages for an injury to its economy allegedly attributable to a violation of the antitrust laws of the United States. We hold that it does not.

I. Procedural History

Hawaii filed its initial complaint on April 1, 1968, against three of the four respondents.[1] On May 24, 1968, and again on August 19, 1968, Hawaii filed amended complaints. The third amended complaint, filed on September 6, 1968, raised for the first time the issue presented herein. That complaint named all four respondents as defendants and charged them with violating the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, in the following ways: by entering into unlawful contracts; by conspiring and combining to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products; and by attempting to monopolize and actually monopolizing said trade and commerce.[2] The State sought to recover damages in three distinct capacities: in its proprietary capacity for overcharges for petroleum products sold to the State itself (first count); as *parens patriae* for similar overcharges paid by the citizens of the State (second count); and as the representative of the class of all purchasers in Hawaii for identical overcharges (third count).

The second count read, in relevant part:

"18. The above-named plaintiff [Hawaii], [acts] in its capacity as *parens patriae*, and/or as trustee

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[1] Chevron Asphalt Co. was not named as a defendant in the initial complaint. As pointed out in the text, *infra*, the company was named as a defendant in the third and fourth amended complaints which raise the question presented to the Court.

[2] In the third amended complaint, the State abandoned a claim made in the initial complaint that the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (a), had been violated. This claim has not been resurrected in any of the later stages of the proceedings.

for the use of its citizens who purchased refined petroleum products, from any defendant or co-conspirator herein . . . .

"19. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize, and monopolization have resulted in the plaintiff, . . . and in its citizens, paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens, however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

Very similar language appeared in the class-action count. In all three counts, the State sought both injunctive and monetary relief.

After each of the respondents moved to dismiss the second and third counts of the complaint, the District Court held a hearing to determine the propriety of the State's suing on behalf of its citizens. With respect to count two, the court held that Hawaii "has not even alleged an interest in its citizens' claims, much less interest of its own aside from the State's proprietary rights," and granted the motions to dismiss.[3] Viewing the class action as being "overlapping, parallel and/or alternative to" the *parens patriae* claim, the court dismissed the third count as well.[4]

Hawaii filed its fourth amended complaint on February 27, 1969. This is the complaint with which we are concerned. Count one contains a reiteration of Hawaii's claim that in its proprietary capacity the State paid an

[3] The opinion of the court is unreported, but is contained in App. 51–58.

[4] *Id.*, at 58.

excessive price for the petroleum products that it purchased from respondents. Count two states a new *parens patriae* claim, and count three is drawn as a class action.

The *parens patriae* claim is stated in the following manner:

"19. The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.

"20. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization, hereinbefore alleged, have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:

"(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;

"(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;

"(c) opportunity in manufacturing, shipping and commerce have [*sic*] been restricted and curtailed;

"(d) the full and complete utilization of the natural wealth of the State has been prevented;

"(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

"(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

"(g) the Hawaii economy has been held in a state of arrested development.

"21. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

The class-action count is similar to that in the third amended complaint. As in the previous complaint, Hawaii seeks both injunctive and monetary relief in each count.

Respondents moved to dismiss the second and third counts, and hearing was again had in the District Court. The class action was dismissed by the court on the ground that "under the circumstances . . . , the class action based upon the injury to every individual purchaser of gasoline in the State, . . . in the context of the pleadings, would be unmanageable." [5] In a rather extensive opinion, the court examined the law that has developed concerning suits by a State as *parens patriae* and denied the motions to dismiss the second count. 301 F. Supp. 982 (1969). Recognizing that the state of the law was unclear, the District Court certified its decision denying the motions to dismiss for an interlocutory appeal pursuant to 28 U. S. C. § 1292 (b).[6] On appeal, the United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court and directed that the second count of the complaint be dismissed.[7] 431 F. 2d

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[5] Reporter's Tr. 154 (May 29, 1969).

[6] The District Court offered to certify its dismissal of Hawaii's class action count, but Hawaii indicated its intention not to appeal the ruling. Since the ruling was not appealed it is not before the Court for review.

[7] Although the Court of Appeals directed that the count be dismissed in its entirety, the parties have not suggested that its decision foreclosed any relief the State might obtain by way of injunction.

1282 (1970). Certiorari was granted so that we might review this decision. 401 U. S. 936 (1971).

II. The State as Parens Patriae

The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers which were referred to as the "royal prerogative." Malina & Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 65 Nw. U. L. Rev. 193, 197 (1970) (hereinafter Malina & Blechman); State Protection of its Economy and Environment: Parens Patriae Suits for Damages, 6 Col. J. L. & Soc. Prob. 411, 412 (1970) (hereinafter State Protection). These powers and duties were said to be exercised by the King in his capacity as "father of the country." [8] Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves.[9] For example, Blackstone refers to the sovereign or his representative as "the general guardian of all infants, idiots, and lunatics," [10] and as the superintendent of "all charitable uses in the kingdom." [11] In the United States, the "royal prerogative" and the "parens patriae" function of the King passed to the States.

The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. This expansion was first evidenced in *Louisiana* v. *Texas*, 176 U. S. 1 (1900), a case in which the State of Louisiana brought suit to enjoin officials of the State of Texas from so administering the Texas quarantine regulations as to prevent Louisiana mer-

[8] Malina & Blechman, at 197; State Protection, at 412.

[9] State Protection, at 412.

[10] 3 W. Blackstone, Commentaries *47.

[11] *Ibid.*

chants from sending goods into Texas. This Court recognized that Louisiana was attempting to sue, not because of any particular injury to a business of the State, but as *parens patriae* for all her citizens. 176 U. S., at 19. While the Court found that *parens patriae* could not properly be invoked in that case, the propriety and utility of *parens patriae* suits were clearly recognized.

This Court's acceptance of the notion of *parens patriae* suits in *Louisiana* v. *Texas* was followed in a series of cases: *Missouri* v. *Illinois*, 180 U. S. 208 (1901) (holding that Missouri was permitted to sue Illinois and a Chicago sanitation district on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River); *Kansas* v. *Colorado*, 206 U. S. 46 (1907) (holding that Kansas was permitted to sue as *parens patriae* to enjoin the diversion of water from an interstate stream); *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907) (holding that Georgia was entitled to sue to enjoin fumes from a copper plant across the state border from injuring land in five Georgia counties); *New York* v. *New Jersey*, 256 U. S. 296 (1921) (holding that New York could sue to enjoin the discharge of sewage into the New York harbor); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas); and *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923) (holding that Minnesota could sue to enjoin changes in drainage which increase the flow of water in an interstate stream).

These cases establish the right of a State to sue as *parens patriae* to prevent or repair harm to its "quasi-sovereign" interests.[12] They deal primarily with original

[12] Article III, § 2, of the Constitution confers original jurisdiction upon this Court over suits between States or by one State against a citizen of another State. In order to properly invoke this jurisdiction, the State must bring an action on its own behalf and not on

suits brought directly in this Court pursuant to Art. III, § 2, of the Constitution under common-law rights of action. The question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act. Hence, Hawaii's claim cannot be resolved simply by reference to any general principles governing *parens patriae* actions.

The only time this Court has ever faced the question of what relief, if any, the antitrust laws offer a State suing as *parens patriae* was in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), the case relied on most heavily by the parties herein. In that case, Georgia sought to invoke the original jurisdiction of this Court by filing an amended bill of complaint against 20 railroads, alleging, in essence, that the railroads had conspired to restrain trade and to fix prices in a manner that would favor shippers in other States (particularly Northern States) to the detriment of Georgia shippers.

Like this suit, *Georgia* arose under the federal antitrust laws. It is plain from the face of the complaint that "[t]he prayer [was] for damages and for injunctive relief." 324 U. S., at 445. See *id.*, at 446–447, 450–451.[13] Georgia claimed that the conspiracy had

behalf of particular citizens. See, *e. g.*, *Louisiana* v. *Texas*, 176 U. S. 1 (1900); *New Hampshire* v. *Louisiana*, 108 U. S. 76 (1883); *Oklahoma* v. *Atchison, T. & S. F. R. Co.*, 220 U. S. 277 (1911). An action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals. See, *e. g.*, *New Hampshire* v. *Louisiana*, *supra*; *North Dakota* v. *Minnesota*, 263 U. S. 365, 376 (1923).

[13] It is evident from the bill of complaint that Georgia sought to sue in four slightly different capacities: its sovereign capacity (first count); as a quasi-sovereign (second count); its proprietary capacity (third count); and as protector of a general class of its citizens (fourth count). Damages were sought in each count, although treble damages were sought only on the last count.

severely damaged its economy and sought to recover damages on behalf of its citizens.

The Court upheld Georgia's claim as *parens patriae* with respect to injunctive relief, but had no occasion to consider whether the antitrust laws also authorized damages for an injury to the State's economy, since approval of the challenged rates by the Interstate Commerce Commission barred a damage recovery on the ground that such a remedy would have given Georgia shippers an unfair advantage over shippers from other States. See *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156 (1922). Nowhere in *Georgia* did the Court address itself to the question whether § 4 of the Clayton Act authorizes damages for an injury to the general economy of a State. Thus, the question presented here is open.

III. Hawaii and the Antitrust Laws

Hawaii grounds its claim for treble damages in § 4 of the Clayton Act, 15 U. S. C. § 15, which reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

This section is notably different from § 16 of the Clayton Act, 15 U. S. C. § 26, which provides for injunctive relief:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage

> by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ."

Hawaii plainly qualifies as a person under both sections of the statute, whether it sues in its proprietary capacity or as *parens patriae*. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S., at 447. But, the critical question is whether the injury asserted by Hawaii in its *parens patriae* count is an injury to its "business or property."

The legislative history of the Sherman and Clayton Acts is not very instructive as to why Congress included the "business or property" requirement in § 4, but not in § 16. The most likely explanation lies in the essential differences between the two remedies.

While the United States Government, the governments of each State, and any individual threatened with injury by an antitrust violation may all sue for injunctive relief against violations of the antitrust laws, and while they may theoretically do so simultaneously against the same persons for the same violations, the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one. This case illustrates the point well. The parties are in virtual agreement that whether or not Hawaii can sue for injunctive relief as *parens patriae* is of little consequence so long as it can seek the same relief in its proprietary capacity. While some theoretical differences may exist with respect to the parties capable of enforcing a *parens patriae* injunction as opposed to one secured by a State in its proprietary capacity, these differences are not crucial to the defendant in an antitrust case.

The position of a defendant faced with numerous claims for damages is much different. If the defendant

is sued by 100 different persons or by one person with 100 separate but cumulative claims, and each claim is for damages, the potential liability is obviously far greater than if only one of those persons sued on only one claim. Thus, there is a striking contrast between the potential impact of suits for injunctive relief and suits for damages.

Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. See *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 4 (1958). This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as "private attorneys general." See, *e. g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 130–131 (1969); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 147 (1968) (Fortas, J., concurring in result).

Thus, § 4 permits Hawaii to sue in its proprietary capacity for three times the damages it has suffered from respondents' alleged antitrust violations.[14] The section

[14] It is true, as MR. JUSTICE BRENNAN suggests, that an injury to the State in its proprietary capacity, as alleged in count one of the complaint, affects the citizens in much the same way as an injury of the sort claimed by Hawaii here. Each has the effect of

gives the same right to every citizen of Hawaii with respect to any damage to business or property. Were we, in addition, to hold that Congress authorized the State

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increasing taxes, or reducing government services, or both. But this does not mean that the two kinds of injuries are identical in nature. Where the injury to the State occurs in its capacity as a consumer in the marketplace, through a "payment of money wrongfully induced," *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 396 (1906), damages are established by the amount of the overcharge. Under § 4, courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its loss in some other way, even though a State, for example, may ultimately recoup some part of the overcharge through increased taxes paid by the seller. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 489 (1968). Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health—a task extremely difficult, "in the real economic world rather than an economist's hypothetical model." *Id.*, at 493.

The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. See, *e. g.*, *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 303 (Mass.), aff'd, 242 F. 2d 758 (CA1), cert. denied, 355 U. S. 828 (1957); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F. 2d 183 (CA2 1970), cert. denied, 401 U. S. 923 (1971); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F. 2d 727, 732–734 (CA3 1970), cert. denied, 401 U. S. 974 (1971); *South Carolina Council* v. *Newton*, 360 F. 2d 414, 419 (CA4), cert. denied, 385 U. S. 934 (1966); *Dailey* v. *Quality School Plan, Inc.*, 380 F. 2d 484 (CA5 1967); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 395 (CA6 1962), cert. denied, 372 U. S. 907 (1963); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564, 566–567 (CA7), cert. denied *sub nom. Illinois* v. *Commonwealth Edison Co.*, 375 U. S. 834 (1963); *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F. 2d 679, 688–689 (CA8 1966); *Hoopes* v. *Union Oil Co.*, 374 F. 2d 480, 485 (CA9 1967); *Nationwide Auto App. Serv.* v. *Association of C. & S. Co.*, 382 F. 2d 925, 928–929 (CA10 1967).

to recover damages for injury to its general economy, we would open the door to duplicative recoveries.

A large and ultimately indeterminable part of the injury to the "general economy," as it is measured by economists, is no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves under § 4. Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State. At the very least, if the latter type of injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act.

Like the lower courts which have considered the meaning of the words "business or property," we conclude that they refer to commercial interests or enterprises. See, *e. g.*, *Roseland* v. *Phister Mfg. Co.*, 125 F. 2d 417 (CA7 1942); *Hamman* v. *United States*, 267 F. Supp. 420 (Mont. 1967), appeal dismissed, 399 F. 2d 673 (CA9 1968); *Broadcasters, Inc.* v. *Morristown Broadcasting Corp.*, 185 F. Supp. 641 (NJ 1960). When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act.

Support for this reading of § 4 is found in the legislative history of 15 U. S. C. § 15a,[15] which is the only

[15] "Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor . . . , and shall recover actual damages by it sustained and the cost of suit." 69 Stat. 282, 15 U. S. C. § 15a.

This section was enacted in 1955 following the decision in *United States* v. *Cooper Corp.*, 312 U. S. 600 (1941), which held that the United States was not a "person" within the meaning of § 7 of the

provision authorizing recovery in damages by the United States, and which limits that recovery to damages to "business or property." The legislative history of that provision makes it quite plain that the United States was authorized to recover, not for general injury to the national economy or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services.

> "The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered." S. Rep. No. 619, 84th Cong., 1st Sess., 3 (1955).

See also H. R. Rep. No. 422, 84th Cong., 1st Sess., 2–5 (1955).

In light of the language used as well as the legislative history of 15 U. S. C. § 15a, it is manifest that the United States cannot recover for economic injuries to its sovereign interests, as opposed to its proprietary functions. And the conclusion is nearly inescapable that § 4, which uses identical language, does not authorize recovery for economic injuries to the sovereign interests of a State.

We note in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and thus that denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. Private citizens are not as powerless, however, as the State suggests.

Sherman Act (the predecessor of § 4 of the Clayton Act). Recovery is limited to actual rather than treble damages because Congress reasoned that the United States, unlike a private party, needed no extraordinary incentive to bring antitrust suits. H. R. Rep. No. 422, 84th Cong., 1st Sess., 3 (1955).

Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U. S. C. § 1337; 15 U. S. C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. The District Court dismissed Hawaii's class action only because it was unwieldy; it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens. Respondents, in moving to dismiss count three of the fourth amended complaint, in which the State sought to bring such an action, virtually conceded that class actions might be appropriate under certain circumstances. The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.

Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries.

The judgment of the Court of Appeals is affirmed for the reasons stated above.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

Today's decision reflects a miserly approach to the fashioning of federal remedies rectifying injuries to the collective interests of the citizens of a State through

action by the State itself. It is reminiscent of the ill-starred decision in *Ohio* v. *Wyandotte Chemicals Corp.*; 401 U. S. 493.[1]

Hawaii, in her fourth amended complaint, sues for damages and injunctive relief as *parens patriae* by virtue of her "duty to protect the general welfare of the State and its citizens." She alleges that the alleged conspiracy among the respondent oil companies has "injured and adversely affected the economy and prosperity" of Hawaii as follows:

"(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;

"(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;

"(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

"(d) the full and complete utilization of the natural wealth of the State has been prevented;

"(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

"(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

[1] In *Wyandotte*, the Court refused to exercise its conceded original jurisdiction over an original complaint filed by the State of Ohio to enjoin alleged pollution of Lake Erie by manufacturing plants in Michigan and Ontario, Canada, because "as a practical matter, it would be inappropriate for this Court to attempt to adjudicate the issues . . . ." 401 U. S., at 501. In the light of our rules permitting the appointment of special masters, however, this rationale is questionable at best. *Id.*, at 510–512 (DOUGLAS, J., dissenting). See generally Woods & Reed, The Supreme Court and Interstate Environmental Quality: Some Notes on the *Wyandotte* Case, 12 Ariz. L. Rev. 691 (1970).

"(g) the Hawaii economy has been held in a state of arrested development."

I see no way of distinguishing the instant case from *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439. The *Georgia* case held that a State may sue as *parens patriae* under the antitrust laws for injury to the economy of the State resulting from a conspiracy to restrain trade and commerce through the fixing of railroad rates. *Id.*, at 446. As we said:

> "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected." *Id.*, at 451.

So-called "growth," "progress," and "development" are more than symbols of power in modern society; they represent the goal which planners—private and public alike—establish and seek to attain. And the State plays an important, at times crucial, role in achieving that goal.[2] If Hawaii can sustain her allegations by proof,

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[2] "In these three respects—as a clearing house for necessary institutional innovations; as an agency for resolution of conflicts among group interests; and as a major entrepreneur for the socially required infrastructure—the sovereign state assumes key importance in channeling the explosive impacts of continuous structural changes, in providing a proper framework in which these structural changes, proceeding at revolutionary speed, are contained and prevented from exploding into a civil war (as they sometimes may, and have). Thus, the high rate of change in economic structure is linked to the importance of the sovereign state as an organizing unit. It is not accidental that, in measuring and analyzing economic growth, we talk of the economic growth of *nations* and use *national* economic accounts. In doing so, we imply that the sovereign state is an

she establishes injury both as respects her tourism and her industry, her "growth" and her "development."

The Court of Appeals was "skeptical of the existence of an independent harm to the general economy." 431 F. 2d 1282, 1285. But as Alabama states in her brief *amicus:*

> "Economists have developed models for measuring the effects upon local economies from infusions or extractions of given sums of money from those economies. In short, a state's economy is susceptible of articulation and measurement."

Hawaii is the magnet of tourism and of industry as well. She measures the health of her economy by her economic growth. No one citizen can stand in her shoes in those respects, for she represents the collective. Those interests should be held to be the State's "business or property" interests, within the meaning of the Clayton Act, and not merely the plants, factories, or hotels which she may own as a proprietor. We held as much in the *Georgia* case. It is indisputable that if Hawaii does prove damages, *Georgia* authorizes recovery. For as MR. JUSTICE BRENNAN points out, Georgia was denied damages only because of a technicality irrelevant to the present case.

Injury to the collective will commonly include injury to members of the collective. In that event damages recovered by Hawaii could not later be recovered by individual entrepreneurs. It might, of course, be shown that the individual's loss for the period in question was distinct from any impact on the collective. Thus, if

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important factor in modern economic growth; that, given the transnational, worldwide character of the supply of useful knowledge and science, the major permissive factor of modern economic growth, the state unit, in adjusting economic and social institutions to facilitate and maximise application, plays a crucial supplementary role." S. Kuznets, Economic Growth of Nations 346–347 (1971).

Hawaii failed to prove that the alleged conspiracy damaged her economy, a single entrepreneur might still be able to prove that it drove him to the wall. The difficulties advanced in this regard are more imaginary than real. They are doubtless rationales that express a prejudice against liberal construction of the antitrust laws. Since a collective damage is alleged, I would allow the case to go to trial, saving to Congress the question whether § 4 of the Clayton Act should be restricted to a State's proprietary interests.

I would adhere to the *Georgia* case and allow Hawaii a chance to prove her charges and to establish the actuality of damages or the need for equitable relief.[3]

I would reverse the judgment and remand the case for trial.[4]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The State of Hawaii seeks treble damages and injunctive relief for an alleged conspiracy among respondents to monopolize and fix prices on the sale of petroleum

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[3] The question of injunctive relief concerns the meaning of § 16 of the Clayton Act which grants relief to any "person" against loss or damage by a violation of "the antitrust" laws. It is settled that a State is a "person" within the meaning of § 16. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 452. Hence, it is clear that even if Hawaii does not prove damages, equitable relief is available as it was in the *Georgia* case.

[4] My quarrel with the Court does not extend to its approving reference to the possibility that Hawaii may yet be able to maintain a class action on behalf of its consumers, *ante*, at 266. Cf. Comment, Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 43 S. Cal. L. Rev. 570, 580–583 (1970). The District Court's dismissal of Hawaii's class action count as "unmanageable" was not certified for interlocutory appeal, and Hawaii's rights under Fed. Rule Civ. Proc. 23 are not before us for review.

products in the State. Count one of Hawaii's complaint alleges an economic injury to the State in its proprietary capacity as purchaser of those products. Count two states a claim by the State, as *parens patriae*, for injury to its "economy and prosperity," including the withdrawal of its citizens' revenues, increased taxes to offset such losses, curtailment of manufacturing, shipping, and commerce, and injury to the competitive position of Hawaiian goods in the national market. Count three alleges a class action on behalf of all purchasers in the State of respondents' petroleum products. The District Court dismissed Count three as unmanageable, but denied respondents' motion to dismiss Count two, the *parens patriae* claim. An interlocutory appeal was taken by respondents under 28 U. S. C. § 1292 (b), and the Court of Appeals for the Ninth Circuit reversed and ordered dismissal of Count two. The Court of Appeals held that even if the State's economy might suffer injury from antitrust violations independent of the injury suffered by private persons, that injury would not be to the State's "business or property" within the meaning of § 4 of the Clayton Act, and in any event would be too remote from respondents' alleged violations to permit the State to recover as *parens patriae*.

Georgia v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), in my view, requires reversal. In that case the State of Georgia sought to invoke the original jurisdiction of this Court to remedy a conspiracy by several railroads to fix rates on the transportation of goods to and from the State. As noted by the Court, *ante*, at 259 n. 13, Georgia sought damages in each of the four counts of its complaint—in its sovereign capacity, as a quasi-sovereign, in its proprietary capacity, and as representative of its citizens. Treating the complaint as a prayer "for damages and for injunctive relief," 324

U. S., at 445, the Court held that Georgia, both as *parens patriae* and proprietor, was an appropriate party to bring these claims:

> "The enforcement of the criminal sanctions of [the antitrust] acts has been entrusted exclusively to the federal government. See *Georgia* v. *Evans*, [316 U. S. 159,] 162. But when it came to other sanctions Congress followed a different course and authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts." *Id.*, at 447.

Georgia was in fact denied damages, but only because such recovery might operate as an illegal rebate on rates already approved by the Interstate Commerce Commission. See *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156 (1922). Implicit in the decision, however, was the holding that Georgia, as *parens patriae*, could have recovered damages under the antitrust laws for a conspiracy involving other than agency-approved transportation charges. That holding applies with equal force here. Hawaii is complaining not of an affront to its abstract sovereignty, but of the economic loss occasioned by respondents' conspiracy. As in *Georgia*, this can only be characterized as a wrong to the State "which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States." 324 U. S., at 451. If that injury would have been a sufficient basis for a damage claim by

Georgia, as we held in that case, then it supports an identical action by Hawaii here.

Even if *Georgia* were not dispositive, I would still find in Hawaii's *parens patriae* count a claim of injury to its "business or property" sufficient to state a claim under § 4. There runs through the Court's opinion an assumption that Hawaii's proprietary claims, though concededly sufficient to state a cause of action, are wholly distinct in concept from those raised by the State as *parens patriae*. While I agree that the two counts represent injuries to the State in separate capacities, the injuries themselves are not so unrelated as to justify a different treatment under the Clayton Act. In *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390 (1906), the city brought a treble-damage action against two pipe companies whose trust and combination had been invalidated in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211 (1899). Claiming injury "'in its business or property,'" 203 U. S., at 395, the city sought damages in its capacity as a purchaser of water pipes for the municipal water system. In upholding the right of the city to bring that action, the Court stated:

> "It was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.*, at 396.

See also *Georgia* v. *Evans*, 316 U. S. 159 (1942).

The determinant, then, is whether "property is diminished by a payment of money wrongfully induced." But what was the nature of the injury to property for which recovery was permitted in *Chattanooga*? Clearly it was nothing more than the added expense incurred by the city's treasury as the result of the antitrust violation.

While it was incurred in the course of a business transaction, the *harm* was to the economic wealth of the city's population as a whole, for any savings in public expenditures that ultimately accrued were for their benefit.

This is the same sort of interest sought to be protected here. Hawaii's economy, to which tourism and the tourist trade are important, would be particularly vulnerable to injury from a price conspiracy involving petroleum products. In seeking to preserve the economic opportunities of its people, and the tax revenues generated thereby, Hawaii is asserting an interest not significantly different in concept from that involved in *Chattanooga*. Whether the injury sought to be remedied consists of additional payments from the public purse, as in that case, or the failure to generate additional wealth, as here, the result in either instance is the same—the Government and its population, as entities, have suffered harm to their economic well-being. If that harm is characterized "business or property" in one case, then we stretch no traditional property concepts in applying the same label in the other.*

*The Court seems to concede as much in saying that an "injury to the State in its proprietary capacity . . . affects the citizens in much the same way as an injury of the sort claimed by Hawaii here." *Ante*, at 262 n. 14. Yet because the assessment of damages might prove more difficult in a *parens patriae* than a proprietary action, the Court concludes that "the two kinds of injuries are [not] identical in nature." *Id.*, at 263 n. 14. The Court plainly confuses two separate issues. The injury to Hawaii's general economy may present problems of proof not raised in its proprietary action, but a mere difficulty in the assessment of damages cannot change the *nature* of the damage claimed. In short, I think that Hawaii has alleged an injury to its "business or property," and on the entirely separate question of proving damages, agree with my Brother DOUGLAS that the injury can be quantified, or at least approximated.

This conclusion is not undercut by 15 U. S. C. § 15a, which limits recovery by the United States for injury to its "business or property" caused by a violation of the antitrust laws to "actual damages suffered" "solely as a buyer of goods." S. Rep. No. 619, 84th Cong., 1st Sess., 3 (1955). Nothing in the Act similarly restricts a *State*, suing as *parens patriae*. As the legislative history of § 15a shows, the major emphasis during passage of the Sherman Act was on the methods of its enforcement. "[I]t was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble-damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money." *Id.*, at 2. Thus private litigants, encouraged by the hope of triple recovery, were seen as a major instrument of antitrust enforcement, supplemented by criminal prosecutions and civil forfeiture actions brought by the Federal Government. These remedies did not, however, adequately protect the Government as the volume of its procurement grew and collusion among its suppliers became increasingly evident. This was the mischief Congress enacted § 15a to curb:

> "The American taxpayer is entitled to full value for his tax dollar. He should be protected against its going into the pockets of wrongdoers in the form of excessive prices and profits gained through violation of the antitrust laws. If he were spending the money himself, he could sue for triple damages. Surely, he is entitled to protection from actual loss where the Government spends it for him. By permitting the United States Government to recover the provable damages resulting from

> unlawful practices engaged in by those with whom it does business, [§ 15a] would afford those safeguards necessary to the Public Treasury and at the same time severely deter those who would conspire in their dealings with Federal departments." H. R. Rep. No. 422, 84th Cong., 1st Sess., 4–5 (1955).

At the same time, however, Congress felt that "unlike the situation with respect to private persons, there is no need to furnish the Government any special incentive to enforce the antitrust laws, a heavy responsibility with which it is already charged," and therefore Congress granted "to the Government the right to recover only actual, as distinguished from treble, damages." *Id.*, at 4. In addition, Congress felt that the United States was "amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered." S. Rep. No. 619, *supra*, at 3.

Thus § 15a served a narrower purpose than the treble-damage provisions of the Sherman and Clayton Acts. The United States was "amply equipped" with "criminal and civil process" for general enforcement, and needed a damage remedy solely to protect itself "as a buyer of goods." On the other hand private litigants, including the States, lacked the Government's "criminal and civil process." Yet they were viewed as primary enforcers of antitrust policy and were armed with the weapon of triple recovery as a means of stimulating their efforts. It is plain from the history of § 15a that Congress did not intend the States to be denied the treble-damage remedy Hawaii pursues here.

Finally, this result does not necessarily lead to double recovery. Since Hawaii is by definition asserting claims "independent of and behind the titles of its citizens,"

Georgia v. *Tennessee Copper Co.*, 206 U. S. 230, 237 (1907), there may be excluded from its recovery any monetary damages that might be claimed by its citizens individually or as part of a properly constituted class. That problem, like uncertainty of damages, is better answered after trial than on the pleadings.

In sum, I think that since no one questions that Hawaii can maintain a treble-damage action in its proprietary capacity, for analogous reasons, Hawaii may also maintain the action pleaded in Count 2 as *parens patriae*.